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THE INTERNATIONAL ACCIDENT PROBLEM

It had to happen one day: it is only surprising that it has taken so long. While courts in Australia and Canada, throughout the U.S.A. and Continental Europe, and even—to come nearest home—Scotland, have all had to struggle with law suits arising out of the ever-increasing road and air accidents which display an abundance of reference points—accident in one country and action in another, residence, domicile and nationality of the *dramatis personae* variously dispersed between both or erupting into a third—the English scene has remained remarkably quiescent; not even courts of first instance have been troubled. But, at last, many of the controversial ingredients have appeared in a mix which has reached the House of Lords, and we have now, in *Boys* v. *Chaplin*,[1] a decision of the highest court in the land on the state of English law in this immensely difficult matter.

The ingredients were these. A road accident in Malta; plaintiff and defendant both normally resident in England; a damages action in England; damages for pain and suffering allowed by English law but not by Maltese. In more factual detail, a car, through the negligence of its driver, the defendant, came into collision with a motor-scooter thereby injuring its pillion-passenger, the plaintiff, who brought a claim for damages in the English courts after he and the defendant had returned to England. Both were British servicemen with their homes in England but stationed

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[*] This article owes much to the kindness and learning of Professor Otto Kahn-Freund who has discussed the whole range of the problem with me, has suggested wise improvements to my initial draft, and has put material at my disposal, in particular the manuscript of his fine, indeed definitive, lectures on Delictual Liability and the Conflict of Laws delivered at the Academy of International Law at The Hague in July 1968 and now published in the *Recueil des Cours* 1968, II. The result has been to allow me to tell a more complete story than my far from encyclopedic knowledge of the relevant foreign materials would have permitted and thereby to give support in greater depth to arguments which I had already formulated and to conclusions at which I had already arrived.

[1] [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085 (*sub nom. Chaplin* v. *Boys*). See also Lasar, "*Phillips* v. *Eyre* Revisited" (1969) 32 M.L.R. 688.

in Malta at the time of the accident, and the defendant's car was insured by an English insurance company. The House of Lords, affirming the lower courts, applied English law so as to allow the plaintiff to recover for his pain and suffering.

Tort liability in the conflict of laws is a latter-day problem. Modern social conditions have given to the topic a prominence formerly denied to it, and tort today is responding to the growth of international travel in much the same way as, in an earlier age, contract responded to the growth of international trade. This prominence is likely not only to remain but to increase in the years to come, and it is therefore of vital importance that old concepts should be re-examined in the new setting. Already the issues have cascaded over the North American continent, where the substantial litigation that has been generated over the past decades reflects the mobility of the American and Canadian populations and the multitude of jurisdictions within each country. However, English legal practitioners also, I am aware, have today to deal not infrequently with clients involved in international accidents, and English courts cannot afford any longer to ignore this area of modern legal thought. It is time to catch up with the international scene.

The transport accident with international incidents is not the only tort problem posed by the international age: probably all the major tort areas are implicated. The communications explosion exposes a man to the risk of having his reputation sullied and his privacy invaded on a global basis. World markets for goods have given a conflicts dimension to products liability: the snail can no longer be contained in a purely Scottish bottle. Economic torts in this country have hardly come of age in the domestic sphere before they are on the verge of being propelled by the internationalisation of business structures into finding a new maturity. But the international—and the interstate—accident is still the most pressing problem, and it is to a consideration of this problem that this article is confined. Accordingly, while much of the argument applies to torts generally, it should be remembered that the solutions suggested for the international accident may not always be appropriate for all other forms of civil wrongdoing.

What justifications can be put forward for applying English law in the circumstances of *Boys* v. *Chaplin?* There are three. The court could apply English law on the ground that the issue of tort liability, including the measure of damages, is governed by the *lex fori* which defers to the *lex loci delicti* only to the extent of imposing no liability in tort where the *lex loci delicti* would impose no liability whatever, whether civil or criminal; on the ground that, whatever the law governing the substance of tort liability, the issue of the measure of damages is one of procedure and hence governed, as are all procedural issues, by the *lex fori;* on the ground that while, in general, the issue of tort liability, including the measure of damages, is governed either by the *lex loci delicti* alone or, cumulatively, by the *lex fori* and *lex loci delicti* together, the *lex loci delicti* is, in the particular circumstances of the case, displaced by English law as "the proper law of the tort," a doctrine which, following a not unfamiliar pattern, owes its invention to the English[2] and its dissemination to the Americans.[3]

In the House of Lords, and also below, there was a fine split of view and opinion. Lord Donovan and Lord Pearson decided for English law on the conventional rule for tort which places English law as the *lex fori* in the dominant position; this was the reasoning of one member of the Court of Appeal, Upjohn L.J., and of the trial judge, Milmo J. Lord Guest took the easy way out by holding the issue to be one of procedure so that English law must apply. Lord Hodson and Lord Wilberforce decided that, while in general both the *lex fori* and the *lex loci delicti* required to be satisfied, in the circumstances of this case the *lex loci delicti* was not relevant as not representing the proper law, so that English law, as both the *lex fori* and the proper law, applied; this was also the reasoning of one member of the Court of Appeal, Lord Denning M.R. In all this only Diplock L.J. dissented, on the basis that the *lex loci delicti* dominated over the *lex fori* and was not displaced by the proper law.

ENGLISH LAW AS THE DOMINANT SUBSTANTIVE LAW

The conventional route which led to English law as the relevant law in the circumstances of *Boys* v. *Chaplin* was by way of the application of the accepted rule for tort liability which has prevailed for a century and which, though often criticised, has never been overthrown. The *locus classicus* of this rule is to be found in the judgment of Willes J. in *Phillips* v. *Eyre*,[4] where he said:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

The need for actionability by English law had already been authoritatively established two years earlier by the Privy Council in *The Halley*[5]; to this requirement Willes J.'s formula added unjustifiability by the foreign law. The contrast between actionability by the *lex fori* and unjustifiability by the *lex loci delicti* may or may not have been deliberate, but it is familiar law that in *Machado* v. *Fontes*[6] the Court of Appeal regarded it as deliberate and held the second of Willes J.'s conditions satisfied where the act in question, a libel, was liable to criminal penalty in the country where it was published although giving rise there to no civil liability for damages or other remedy.

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[2] By Dr. Morris, initially in a note on *M'Elroy* v. *M'Allister* (*infra*, note 45) in (1949) 12 M.L.R. 248 and expanded in an article in (1951) 64 Harv.L.R. 881.

[3] See, in particular, the Restatement Second of the Conflict of Laws, Proposed Official Draft of May 1968.

[4] (1870) L.R. 6 Q.B. 1, 28–29.

[5] (1868) L.R. 2 P.C. 193.

The defendant's attack on the current rule entailed an attack on the correctness of the decision in *Machado* v. *Fontes*; Lord Hodson, while himself supporting the overruling of that decision, was clear that, "if *Machado* v. *Fontes* could be supported on the ground that actionability is not essential," the plaintiff "must succeed."[7] It may be asked why the *Machado* decision matters here; the act complained of was clearly civilly actionable in Malta as well as in England, and it does not necessarily follow from an acceptance of *Machado* that the court applies English law, as it would still be possible for it to apply the Maltese remedy and award the plaintiff damages for his financial loss only. But once it is accepted that, as between a particular plaintiff and a particular defendant, civil liability may be imposed for acts which would not be civilly actionable between the same parties under the *lex loci delicti*, there is no alternative for the court but to apply English law in deciding for the plaintiff; and from this necessary conclusion it is an easy step to require the total application of English law in the occasional case where the crucial difference between the two competing laws is only in the *extent* of the civil liability as between plaintiff and defendant.[8] In effect, allowing participation of the *lex loci delicti* only to the limited extent envisaged by the *Machado* decision has the immediate result of making the *lex fori* the real master in the tort arena: as Lord Pearson said, "'the Willes formula' shows that . . . the substantive law of England plays the dominant role."[9] Indeed Diplock L.J. in the Court of Appeal pointed out that a careful analysis of *Machado* v. *Fontes* revealed that the defendant there had advanced two unsuccessful pleas: the plaintiff's action must fail because no damages whatsoever could have been recovered for the libel in the country of publication or, alternatively, because only special damages could have been recovered there and the plaintiff's claim was for general damages.[10] The correctness of the decision therefore came directly in issue.

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[6] [1897] 2 Q.B. 231 (C.A.).

[7] [1969] 3 W.L.R. 822, 830.

[8] This step, however, has not always been taken by jurisdictions subscribing to the *Machado* v. *Fontes* rule; see, *e.g.*, *Li Lian Tan* v. *Durham* [1966] S.A.S.R. 143. And *cf.* Dicey and Morris, *Conflict of Laws* (8th ed. 1967), pp. 944–945.

[9] [1969] 3 W.L.R. 822, 849.

[10] [1968] 2 Q.B. 1, 34–35. He added that if he was able to swallow the camel of the first proposition he would not strain at the gnat of the second: *ibid.* at pp. 41–42.

What then are the arguments for the current rule, requiring actionability by the *lex fori* but only unjustifiability by the *lex loci delicti*, which persuaded Lord Donovan and Lord Pearson to endorse its retention and uphold *Machado* v. *Fontes*? "The main advantages," said Lord Pearson, the more explicit of the two, "are, first, that it has a high degree of certainty and, secondly, that it enables an English court to give judgment according to its own ideas of justice." [11] But neither of these reasons can stand up to scrutiny. Of course if an English court is not required to have regard to the tort law of a foreign jurisdiction but may rest content with its own rules the results are likely to be more certain, and of course if an English court may apply its own rules in preference to those of a foreign jurisdiction its own ideas of justice will prevail, but each of these arguments represents a total negation of any system of conflict of laws and shows a predilection for the sole application of English law, whatever the tort and wherever committed. Indeed, if the English courts are so intent upon the application of English law, why even require the act to be unjustifiable by the *lex loci delicti*? Surely the quest for certainty calls for no reference whatsoever to a foreign law. Surely the application of English ideas of justice must also require that a plaintiff should succeed if he can show an act which is tortious by English standards even though totally blameless by the *lex loci delicti*; take, for instance, a situation in which English law has imposed, but the foreign law has not, liability without fault.

And yet this narrow approach has not been taken by the English courts elsewhere, neither in the field of contract nor in the field of property, in both of which it is commonplace for a foreign law to be applied to the exclusion of English law. Is there then some reason why the pattern should be different when it comes to tort? On the issue of certainty, it is difficult to see any. The most that can be said is that a plaintiff should perhaps be protected against the situation in which he is unable to prove the relevant provisions of the foreign law, a dilemma best illustrated by a decision of the U.S. Federal Court of Appeals for the Second Circuit, *Walton* v. *Arabian American Oil Co.*,[12] where a U.S. citizen's claim against a U.S. oil company in respect of injuries sustained in an accident in Saudi Arabia failed because he was unable to satisfy the court that the defendant would have been liable under the Islamic law of Saudi Arabia. But the protection of a plaintiff—or a defendant—in such a predicament is easily achieved by resort to the presumption of English law that foreign law is the same as English law. On the issue of the application of English ideas of justice, it is even harder to discover any convincing arguments. While it is universally recognised that every country is entitled to refuse to apply the laws of others on grounds of public policy—matters of crime and of trading with the enemy are familiar cases—a country's public policy does not call for the application of all its internal rules: there is a recognised difference between *ordre public interne* and *ordre public international*.[13] Indeed the attitude that, in tort law, English policy must prevail is essentially outmoded, stemming from a time when tort had not emancipated itself from crime, when the accent was still on punishment and not yet on compensation, and when Oliver Wendell Holmes's celebrated statement as to the aim of the law of torts was still in the future.[14] In the initial championship of the *lex fori* which emerged from Germany in the 1840s,[15] the appearance of the criminal analogy appears clearly,[16] and these early German views were before the Privy Council when deciding *The Halley*.[17] But all this is outdated history. Continental Europe long since rejected the *lex fori* in favour of the *lex loci delicti*[18]; so too did the U.S.A.[19]

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[11] [1969] 3 W.L.R. 322, 352.
[12] 233 F. 2d 541 (2d Cir. 1956).

The current rule also enables the English courts to give redress "if one Englishman wrongfully injures another in a primitive country or unsettled territory where there is no law of torts"[20]; this Lord Pearson saw as another of its advantages, although he did admit that, however important it may have been in the early landmark cases leading to today's rule,[21] it is not of great importance now. It is nevertheless significant that Lord Pearson envisaged the injury, in these now unlikely circumstances, as being inflicted by an Englishman upon an Englishman; is it so clear that the English courts should respond with an application of English law had the injury been inflicted by a Frenchman upon a Frenchman? For, in truth, the appropriateness of applying English law in Lord Pearson's illustration stems not from English law being the law of the forum but from English law being the proper law, the law having the most substantial connection with the tort. This point is brought out in a modern context by the decisions from Canada which Lord Pearson also cited as supporting the current English rule, decisions in favour of gratuitous car passengers suing their drivers for negligence, where the accident had taken place in a jurisdiction which by means of a so-called "guest statute," so common in North America, denied all right of action to the gratuitous passenger for his driver's negligence but where the action was brought in a jurisdiction of which both driver and passenger were domiciliaries.[22] The correctness of these decisions is not challenged, but they do appear to reflect murmurings of the proper law rather than an application of the current rule and *Machado* v. *Fontes*. For, once again, what is to be the result if the parties had been found to be both domiciliaries of the jurisdiction in which the accident occurred and not of the jurisdiction in which the action was brought?—if, in the context of *Boys* v. *Chaplin*, a Maltese injured by another Maltese in Malta elected to bring suit in England? Applying the current rule the result should be the same, and English law would apply so as to give the plaintiff damages for his pain and suffering.

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[13] See Kahn-Freund, "Reflections on Public Policy in the English Conflicts of Law" (1954) 39 *Transactions of the Grotius Society* 39, 41 *et seq.*, 49 *et seq.*

[14] *The Common Law* (1881), p. 144 ("the general purpose of the law of torts is to secure a man indemnity against certain forms of harm . . . not because they are wrong, but because they are harms").

[15] Wächter, "Über die Collision der Privatrechtsgesetze verschiedener Staaten," *Archiv für die civilistische Praxis*, Vol. 24, p. 230, Vol. 25, pp. 1, 161, 361 (1841–42); Savigny, *System des heutigen römischen Rechts*, Vol. 8, pp. 275 *et seq.* (1849).

[16] Wächter, *op. cit.*, Vol. 25, pp. 392 *et seq.* His argument is built on illustrations of death and injury by duel and under provocation.

[17] Savigny was cited both to the Privy Council ((1868) L.R. 2 P.C. 193, 195) and to Sir Robert Phillimore at first instance ((1867) L.R. 2 A. & E. 3, 4). True, the latter was not impressed (*ibid.* at pp. 17–19) but he was reversed.

[18] Germany had done so before the last century was out: see in particular the decision of the Reichsgericht of July 9, 1892, RGZ 29, 90. The critical French decision was that of the Cour de Cassation of May 25, 1948, D. 1948, 357, S. 1949. 1. 21.

[19] The corner was finally turned by Cardozo J.'s judgment in *Loucks* v. *Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918), but the ground had been prepared by Holmes J. in a series of decisions in the U.S. Supreme Court from *Slater* v. *Mexican National Railroad Co.*, 194 U.S. 120 (1904) onwards. The fact that the *lex loci delicti* is being superseded in the U.S.A. by the proper law is another matter.

[20] [1969] 3 W.L.R. 322, 352.

[21] *Mostyn* v. *Fabrigas* (1775) 1 Cowp. 161 is the outstanding example.

But Lord Donovan and Lord Pearson would baulk at this result. Where the plaintiff has indulged in forum-shopping, they say, the position is different and an exception must be created to prevent his profiting from his astuteness.[23] It is certainly right that the forum-shopper should not be afforded an advantage, but it should be seen that it is only because of the acceptance of the current rule that forum-shopping becomes a problem in the first place. And, beyond this, what has now become of their Lordships' desire for the English court to "give judgment according to its own ideas of justice"? What has become of their advocacy of the certainty principle? In truth, by admitting that the forum-shopper will not be given friendly treatment, their Lordships are really beginning to accept that what counts is some law other than that of the forum, whether that law is the *lex loci delicti* or the proper law.

Furthermore, not even an exception for forum-shoppers would deal with the whole of the problem. While there is clearly forum-shopping if a person deliberately ignores the primary forum and seeks out a secondary one for the sole reason that its tort law is more favourable to him, one can easily imagine situations where there are bona fide reasons, in particular reasons of convenience, for bringing the action in the secondary forum. Take, for instance, the case of a Maltese soldier negligently injured by another Maltese soldier in their barracks in Malta on the eve of their regiment's leaving for two years' duty in England. For the injured soldier to sue in England could hardly be called forum-shopping, but should he be any the more entitled to damages for pain and suffering? Or, if a more practical illustration is needed, what if a Maltese whose home is in Malta is injured there by an Englishman and the Englishman, who is only in Malta for a brief holiday, immediately afterwards returns home to England? It cannot be forum-shopping in these circumstances for the Maltese to seek redress in the English courts, but again should that fact open the door for him to a damages award for his pain and suffering?

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[22] *McLean* v. *Pettigrew* [1945] 2 D.L.R. 65 (Supreme Ct. of Canada); *Morris and Stalback* v. *Angel* (1956) 5 D.L.R. (2d.) 30 (British Columbia Supreme Ct.).

[23] [1969] 3 W.L.R. 322 at p. 336 and pp. 356–357 respectively.

ENGLISH LAW AS THE PROCEDURAL LAW

Alternatively, the application of English law could be based upon the classification of the issue of measure of damages as one of procedure rather than one of substance. English courts, even if not prepared to be so blatant as to assert that English law must always be the dominant law, have a second, more limited, route available to them leading to the application of English law, *i.e.*, they may hold that the matter is wholly procedural and therefore subject to the *lex fori*. While undoubtedly it makes sense that matters of procedure must be for the *lex fori* if the administrative wheels are going to turn, the borderline between substance and procedure is sufficiently uncharted as to afford courts scope for the expansion of the application of their own domestic law by giving a wide interpretation to procedure and a correspondingly narrow interpretation to substance. The familiar dichotomy between rights as matters of substance and remedies as matters of procedure is endemic of such an approach and, if accepted, would have provided a quick solution to the problem in *Boys* v. *Chaplin*: a question of damages is a question of remedy and therefore a question of procedure. However, their Lordships, other than Lord Guest, refused to arrive at the application of English law by this easy but false route, denying that once one has crossed the boundary from liability to damages one is necessarily out of substance, and adopting the more limited proposition that, while the quantification of damages is a matter of procedure, the question of the allowable heads of damages is one of substance. Lord Wilberforce pertinently remarked that " there certainly seems to be some artifice in regarding a man's right to recover damages for pain and suffering as a matter of procedure." [24]

Indeed there were already decisions from Scotland, which their Lordships accepted as correct, that the right to damages for non-pecuniary loss, by way of *solatium*, to the dependants of a person tortiously killed was a matter of substance,[25] and surely the same must be true of damages for non-pecuniary loss where the claim is by the victim of a non-fatal injury rather than the victim of a fatal one. Lord Guest had of course to attempt to distinguish these two situations, but his arguments are unconvincing. He said:

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[24] *Ibid.* at p. 344.

> " *Solatium* properly so called denotes a separate right of action given only to near relatives whereas *solatium* for pain and suffering of an injured party . . . connotes an element in the ascertainment of damages for the injuries suffered by a plaintiff. These consist of various elements, *solatium* for the pain and suffering, out of pocket expenses, actual loss of wages and future problematical patrimonial loss due to loss of earning capacity." [26]

But it is not true to say that the near relatives have a right of action for *solatium* separate from their right of action for pecuniary loss arising from their loss of the deceased's support. The illusion of a separate right of action is to some extent fostered by the fact that the term " action for *solatium* " is sometimes used in Scotland to refer to the *whole* cause of action available to the near relatives, both for their pecuniary and their non-pecuniary loss,[27] and also by the fact that the total loss of a near relative, unlike the loss of a person physically injured, may often not go beyond his non-pecuniary loss—this is particularly true in claims by parents and grandparents. The acid test, however, is whether a claimant could sue separately for his *solatium*, in its limited sense of non-pecuniary loss, and for his loss of the deceased's support; it is clear that he could not, for " the right . . . is one and indivisible." [28] Moreover, the Scottish authorities apart, Lord Guest's conclusion that " it would not be correct, in my view, to talk of compensation for pain and suffering as a head of damages apart from patrimonial loss " [29] is completely out of step with the growing insistence that judges be required to make separate assessments in personal injury awards for the pecuniary and for the non-pecuniary loss.[30]

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[25] *Naftalin* v. *L.M.S. Ry. Co.*, 1933 S.C. 259; *M'Elroy* v. *M'Allister*, 1949 S.C. 110.

[26] [1969] 3 W.L.R. 822, 835.

[27] Walker, *Law of Damages in Scotland* (1955), p. 615; *Duffy* v. *Kinneil Coal Co.*, 1930 S.C. 596, 597, *per* Lord President Clyde.

[28] *M'Elroy* v. *M'Allister*, 1949 S.C. 110, 121, *per* Lord Mackay. And see generally Walker, " Solatium " (1960) 62 Jur.Rev. 144, tracing the historical development and regarding the right to *solatium* as a substantive right separate from the right in respect of patrimonial or pecuniary loss, but giving no evidence of the existence of separate rights of *action* for the two items of claim.

[29] [1969] 3 W.L.R. 822, 835.

[30] Kemp and Kemp, *The Quantum of Damages in Personal Injury Claims* (3rd ed., 1967), p. xv, together with note 34 where many other proponents of separate assessments are cited by the authors. Moreover, the Law Commission is considering recommending that the pecuniary losses themselves should be itemised; this clearly implies that the non-pecuniary loss is to be separately assessed.

ENGLISH LAW AS THE PROPER LAW

The third ground for the application of English law in the circumstances of *Boys* v. *Chaplin* was the most radical. Since it is to the *lex loci delicti* that legal systems have turned, and rightly turned, once they have put aside the imperious claims of the *lex fori*, Lord Hodson and Lord Wilberforce, once they had rejected *Machado* v. *Fontes* and accepted that the *lex loci delicti* controlled as much as the *lex fori*, were at first led to the need for compliance with Maltese law as the *lex loci delicti*. Hence, in order to arrive at the sole application of English law, they had to follow their initial recognition of the general importance of the *lex loci delicti* with its displacement, in the special circumstances of the case, by English law as the more relevant law and therefore the proper law. On what basis, however, could their Lordships justify a solution involving the displacement of the *lex loci delicti*?

Three authoritative documents, two of a quasi-legislative nature, point the way to such a solution. From the U.S.A. comes the Draft Restatement Second of the Conflict of Laws, nearing if not reaching its final form in the Proposed Official Draft of May 1968; of European origin are the Draft Benelux Treaty for the Unification of Private International Law, initially of May 1951 and now in a version of November 1966, and the Draft Resolution of the Institut de Droit International passed at its Edinburgh meeting as recently as September 1969. All three adopt a like approach to the problems presented by actions for personal injury and wrongful death. The Restatement Second provides that in such actions

> " the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied." [31]

The somewhat similar conclusion of the two European Drafts, however, appears in relation to torts generally. The Benelux Draft states first that the *lex loci delicti* determines the liabilities resulting from a delict and adds that

> " if the consequences of an act fall within the legal sphere of a country other than that in which the act took place, then the resulting obligations are determined by the law of such other country " [32];

the Institut's Resolution declares that " on principle delictual liabilities are governed by the law of the place at which the delict is committed " but that

> " in the absence of any substantial connection between the issue to be determined and the place or places at which the

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[31] The wording is exactly the same for personal injuries, in s. 146, and for wrongful death, in s. 175.

[32] Art. 14 (formerly [illegible]

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> delict was committed, that issue may by way of exception . . . be governed by the law the application of which results from a special relationship between the parties or between them and the occurrence." [33]

Although there are obviously differences of detail between these three formulations, it is clear that each accepts as the general but not the invariable rule that the *lex loci delicti* controls.[34] The same however is not true of the general principle enunciated by the Restatement Second for application to all torts for which rules of greater precision are not formulated; in such cases the jurisdiction with the most significant relationship is given prime place and no mention is made of the *lex loci delicti* as the prima facie candidate.[35]

Neither Lord Hodson nor Lord Wilberforce was willing, or indeed asked, to accept the doctrine of the proper law of the tort as the fundamental guiding principle [36]; the imprecision of the concept of " the most significant relationship " in its bald form rightly did not appeal to them, and indeed in this form is not proposed by the Restatement Second itself in relation to claims for personal injury.[37] On the other hand, both were prepared to accept that, although the *lex loci delicti* provided the norm, it could occasionally, but perhaps rarely, be displaced. For English support for this solution, moreover, Lord Hodson could turn to the authority of the Willes formula itself with its introductory words " as a general rule "; these words, he thought, " should be interpreted so as to leave some latitude in cases where it would be against public policy to admit or to exclude claims." [38] Lord Wilberforce, whose speech is undoubtedly the best of the five, saw

> " great virtue in a general well-understood rule covering the majority of normal cases . . . [which] must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred " [39];

but at the same time he considered that modification must be allowed as

> " no purely mechanical rule can properly do justice to the great variety of cases where persons come together in a

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[33] Art. 1 and art. 3 respectively.

[34] The Draft Convention on the Law Applicable to Traffic Accidents, which was passed by the Eleventh Session of The Hague Conference on Private International Law in October 1968, also gives expression to essentially the same solution but is at once more precise and more categorical in its specifications of points of contact for determining the applicable law. Also, of course, it is limited to traffic accidents.

[35] s. 145.

[36] [1969] 3 W.L.R. 322 at pp. 331 and 343, respectively.

[37] Nor was it proposed by Dr. Morris; in his original formulation of the proper law concept he accepted that generally there would be no need " to look beyond the place of wrong ": (1951) 64 Harv.L.R. 881, 884, 885 and 894.

[38] [1969] 3 W.L.R. 322, 331.

[39] *Ibid.* at p. 343.

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foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems." [39]

Lord Wilberforce also laid stress—and in this he was following the pattern of the Restatement Second—on the need to take each issue in a claim separately when deciding whether or not the *lex loci delicti* should be displaced [40]: thus the issue of the heads of damage, which was the issue before the House, might not be governed by the same law as the issue of the standard of liability. Having proceeded this far, their Lordships were then faced with undoubtedly the most difficult of the many difficult questions before the House in the case: were the circumstances such as to call for the displacement of the *lex loci delicti* in deciding the issue of the types of loss for which damages could be claimed? While Lord Hodson and Lord Wilberforce thought the circumstances were indeed such, being persuaded by the fact that both plaintiff and defendant had only a tenuous connection with Malta and a strong one with England, the question of how far the *lex loci delicti* should be displaced, and for what reasons, is deferred for detailed consideration to a later stage.

The one sad factor about the conclusion reached by Lord Hodson and Lord Wilberforce is that the pervasive influence of the *lex fori* has not been dispelled. The restated rule is double actionability, in the normal case by the *lex fori* and the *lex loci delicti*, in the exceptional case, where the *lex loci delicti* is ousted, by the *lex fori* and the most relevant or proper law. The *lex loci delicti* may be ousted, but the *lex fori* is never ousted. In the case before the House it did not matter since the *lex fori* and the proper law turned out to be one and the same. But this need not always be so. If two Maltese living in Malta are involved in an accident in France in circumstances which are considered to make French law the proper law in relation to a claim by one against the other for negligent injury—or indeed in the simpler case of two Maltese involved in a Maltese accident—ought not the English court to apply Maltese law *alone* without requiring English to be satisfied as well should English law in some relevant respect give less protection to the plaintiff than Maltese? Lord Wilberforce did indeed squarely face the question whether English law as the *lex fori* should still be allowed a controlling function, and asked whether *The Halley* as well as *Machado* v. *Fontes* should be overruled. He pointed out that the rule in *The Halley* is old and untried, looks parochial, and that "outside the English speaking common law it is hardly to be found" [41]; but he was nevertheless persuaded for two reasons not to discard it.

The first reintroduces the argument which had already appealed to Lord Pearson, the argument that to retain the role of the *lex*

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[40] *Ibid.* at pp. 842–843 and 844.

[41] *Ibid.* at p. 889.

fori is to retain a high degree of certainty. "To adopt the *lex delicti* as the substantive law," said Lord Wilberforce,

> "would require proof of a foreign law, an objection which should not be exaggerated since in practice it could be met by suitable pleading and with the aid of a presumption that foreign law coincides with that of the forum. But the intrusion of this foreign element would complicate the task of the adviser, who would at least have to consider, to a greater extent than the present rule compels him to, the possible relevance of a foreign law to his client's case." [43]

But this, once again, is a return to a parochial attitude: if English law is to be applied because it is easier—and the difficulties about advisers are surely not so daunting in this day and age—then conflict of law rules might as well be forgotten about altogether. And what is particularly surprising is that Lord Wilberforce should embrace the certainty argument after he has pronounced himself in favour of overruling *Machado* v. *Fontes*. For if actionability by the *lex loci delicti* as well as by the *lex fori* must be shown, then there *will* still be cause to look at the foreign law in detail to gauge its impact. Or at least this will be true where the particular plaintiff can show that, by English law, he has a good cause of action against the particular defendant entitling him to some measure of recovery, however wide or restricted, for his loss; then whether the same is true of the foreign law must be investigated. True, if English law pronounces a total *non possumus* on the claim, there will be no need to look further under the double actionability rule; but it cannot be right to make a distinction here by reason of any principle of certainty. If one does not care about certainty where English law would afford a claim for damages, why should one suddenly care about it where English law would reject a claim for damages?

Lord Wilberforce's second argument mounts an attack upon the *lex loci delicti* itself. His Lordship pointed to the character of the majority of foreign torts, which mainly involve personal injury or death sustained by persons travelling away from the place of their residence and in which the place of the occurrence of the wrong is becoming increasingly fortuitous with the speed of travelling, and concluded that "to fix the liability of two or more persons according to a locality with which they may have no more connection than a temporary, accidental and perhaps unintended presence, may lead to an unjust result." [43] But how inconsistent to criticise the *lex loci delicti* in relation to the *lex fori* and at the same time to extol its virtues in relation to the *lex fori* by overruling *Machado* v. *Fontes*. And how unfair to use such criticism of the *lex loci delicti* to justify putting the *lex fori* in its place when weaknesses of this nature in the *lex loci delicti* are to be righted by resort to the proper law.

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[43] *Ibid* at p. 340.

THE RATIO DECIDENDI

What does the case hold for the future? What of the *ratio decidendi*? In truth it decided nothing, for there was no clear majority for any of the grounds upon which the application of English law was based. Lord Guest thought the issue involved only procedure; his brethren disagreed, three of them expressly. Lord Donovan and Lord Pearson considered that actionability by the *lex loci delicti* was not necessary; the other three Law Lords maintained that it was. Lord Hodson and Lord Wilberforce were prepared to create a limited exception to the applicability of the *lex loci delicti*; the other three expressed themselves to be against any form, however limited, of a proper law doctrine. This bizarre situation was produced by Lord Guest who, not content with deciding for English law as the procedural law, sought to align himself *against* each of the other reasons for applying English law, and thereby created a three to two majority against both the other *rationes decidendi*. He thus made it possible to advance the following propositions: (1) the issue is not one of procedure, and therefore English law is not to be applied as the procedural law; (2) *Machado* v. *Fontes* is overruled, and therefore English law is not to be applied as the dominant substantive law; (3) no proper law doctrine is accepted, and therefore English law is not to be applied as the proper law. Hence Diplock L.J.'s dissent in the Court of Appeal stands and Maltese law is applied!

Nor can such a conclusion be dismissed as necessarily misconceived, for it seems to be logically unavoidable. The position is best tested by imagining a judge at first instance faced with deciding the same point upon a set of material facts identical to those in *Boys* v. *Chaplin*. There is no doubt that one of the above three propositions would have to be abandoned in order to make way for the application of English law. The surmise may perhaps be justified that, for the resolution of this impasse, it is the least progressive proposition which would be sacrificed—that, in other words, if Lord Donovan, Lord Guest and Lord Pearson had been precluded from applying English law on a procedural basis or by resort to *Machado* v. *Fontes*, they would have made a concession in their hostile attitude to the proper law rather than have followed Diplock L.J. and applied Maltese law. But the specious nature of such an argument should be realised, for it can be used with equal logic to support the reversal of any single one of the three propositions which emerge from the decision. Like the sorcerer's apprentice, their Lordships have unwittingly started the law on an inexorable march in a direction they hardly desire, and the advance can only be halted by the intervention of their newly assumed power to overrule their own precedents, so as to alter not indeed the outcome of their decision but their reasons for arriving at it.

The result is that *Boys* v. *Chaplin* comes to be seen not as having presented us with a landmark decision but only as having provided a setting for the airing of the views of the House on the proper solution of the problems to which the facts gave rise. The field of choice, in effect, remains wide open; and even the strength still accorded to the *lex fori* may yet be eroded. Accordingly, it is not out of place to continue to advance the claims of the *lex loci delicti* to recognition, and in addition to give some thought to two important problems which will require solution if we are to progress to the stage of accepting that, as a general rule, the *lex loci delicti* is entitled to sole control. The two problems are these. First, in what circumstances is the *lex loci delicti* to be displaced by what is considered to be a more relevant law? And secondly, in what circumstances is the *lex loci delicti* to be displaced by the *lex fori* as the procedural law? [43]

DISPLACEMENT OF THE LEX LOCI DELICTI BY ANOTHER SUBSTANTIVE LAW

The *lex loci delicti's* claim to be the controlling law can be simply stated: in the vast majority of cases its application fulfils the justified expectations of at least one of the parties concerned. On principle both tortfeasor and victim should be entitled to rely upon the protection of the social order and the legal system of the country in which they have chosen to live. It is no answer to this claim to say, as does the Restatement Second in two of its comments, that in the field of accidents there are no justified expectations to protect because the author of an accident will generally have given no thought either to the legal consequences of his conduct or to the law which will be applied to determine those consequences.[44] For there is the particular point that every third party liability insurance policy—that talisman of the modern motorist—will have been written upon the basis of the liabilities which the insured anticipates that he will encounter; and there is the general, and more important, point that, however little a contemplation of legal rights and duties may have influenced events leading up to an accident, once the dust has settled and both tortfeasor and victim are beginning to think of such matters, each of them will surely and reasonably expect, if it is in his home country that the accident has happened, that his position will be governed by the law of that country and by the rights, remedies, defences and immunities which its legal rules afford.

Thus if the plaintiff lives in the jurisdiction in which the accident takes place, there is no good reason for displacing the *lex loci*

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[43] The problems surrounding the definition of the *locus delicti* are not entered upon here. International accidents do not give rise to the familiar contest between the place of the act and the place of the harm to nearly the same extent as do other areas of tort, notably products liability and defamation, and accordingly accidental shootings across jurisdictional frontiers and the like are left on one side.

[44] Comment (g) to s. 6 (2) at p. 18; and Comment (b) to s. 145 (1) at pp. 5–6.

delicti merely because the defendant lives elsewhere. This should be so whether the *lex loci delicti* is more or less favourable to the plaintiff than the law of the defendant's residence: the fact that he was injured by someone from outside his own country should neither prejudice him nor bring him a windfall. This applies equally to the Scottish crofter run down by an Englishman touring the Highlands, to the Swiss farmer injured when the Simplon express, en route for Belgrade, leaves the line because of a defect in a sleeping-car of the Paris-based Compagnie Internationale des Wagon-lits et du Tourisme, and to the New Jersey family deprived of its head when part of the plane of a New York-based airline drops on him in a busy Princeton street in the course of a flight from New York to Washington D.C. Conversely, if it is the defendant who lives in the jurisdiction where the accident occurs, the *lex loci delicti* should again be applicable to the defendant. Certainly he should not be prejudiced; nor indeed should he be advantaged. Thus a modern Scot, on a modern Grand Tour, injured by a Nova Scotian motorist in Nova Scotia, by a Japanese train operating in Japan, or by an Argentinian airline operating domestically within the Argentine, should not be permitted to claim the protection of the favourable features of Scottish tort law or be met with the unfavourable ones.

It is only when both parties have their homes out of the jurisdiction in which the accident takes place that the displacement of the *lex loci delicti* takes on colour. Probably the strongest case for displacement appears in the familiar illustration of the accident which occurs during the two-family foreign holiday in the one-family car. Why should Mrs. Smith of number 44 Acacia Avenue suing her neighbour at number 42 for his negligent driving have her legal position dictated by the fact that the accident happened on a tricky corner on the Moyenne Corniche on a day in which they had been travelling in France, Monaco and Italy? This type of situation is the one most frequently met, with suitable geographical alterations, in the North American litigation; it also appeared in the critical but misguided Scottish decision in *M'Elroy* v. *M'Allister*.[45] In that case the Court of Session applied English law so as to disallow recovery of *solatium* by a Scottish widow whose Scottish husband had been killed when a passenger in a lorry driven negligently by the Scottish defendant in the course of a journey which had originated in Scotland and upon which the deceased had embarked under instructions from his Scottish employers who were owners of the lorry—and all because the accident happened in England, a mere forty miles from the Scottish border. This surely is mechanical jurisprudence at its most mechanical, and it is to the credit of the Americans that they have opened the way to the rejection of the *lex loci delicti* in this type of situation in their well-

[45] 1949 S.C. 110.

publicised breakthrough of 1963, the decision of the New York Court of Appeals in *Babcock* v. *Jackson*.[46]

In *M'Elroy*, in *Babcock*[47] and also in the illustration of the Acacia Avenue neighbours, not only did both tortfeasor and victim have their homes in the same country but there also existed between them a pre-accident nexus which itself had been formed in the country of common residence and home. Two separate factors therefore pointed to the displacement of the *lex loci delicti*.[48] The serious difficulties, however, start where in a particular set of circumstances only one or other of these factors is present or, alternatively, where there is a divergence between them so that there is one country of common home and another of pre-accident nexus.

We may first dispose of the comparatively easy case, that in which neither factor is present, *i.e.*, where tortfeasor and victim, though both resident out of the jurisdiction in which the accident takes place, are nevertheless not resident in the same jurisdiction and, in addition, are subject to no pre-accident nexus. In these circumstances, the normal dominance of the *lex loci delicti* is not displaced: if a Swiss skier collides with and injures an Italian sunbather on an Austrian ski-slope, should not Austrian law still apply, at least if Italian and Swiss law are not in agreement upon the legal consequences of the accident?[49] But now introduce a pre-accident nexus between the parties emanating from a jurisdiction other than that in which the accident occurs, and the situation is substantially changed. Thus if an Air Canada plane crashes in Saskatchewan on a flight from Quebec to Vancouver, should the law of Saskatchewan be of any relevance in claims against the pilot by passengers with homes as far flung as Sweden and Puerto Rico? Should not perhaps the applicable law be that of the jurisdiction in which the aircraft is registered? Such a solution is supported by the analogy of accidents at sea committed internally to the ship where the law of the flag prevails, and also by the occasional proposal, appearing for instance in the Draft Resolution of the Institut de Droit International, that in claims by car passengers against their drivers the law to be applied is that of the place of the car's registration.[50] And yet the law of the garage or the *lex stabuli*, as this has been variously dubbed, may not seem particularly appropriate where the relationship between driver and passenger has been established elsewhere than in the jurisdiction of registration, and especially where established in the jurisdiction in which the accident takes place. Moreover, if in the Air Canada plane, while it is still over Saskatchewan, one passenger negligently injures another and both, though strangers to each other, live in Sweden, should this make a difference? In short, where the law of the place of the special relationship and the law of the place of the common home diverge, which should take precedence? This particular clash of contacts has already had a full airing in the courts of New York. In 1965 in *Dym* v. *Gordon*,[51] the New York Court of Appeals, divided four to three, applied the law of Colorado so as to defeat a claim by a car passenger against her driver for injuries sustained in a Colorado accident, where both were New York domiciliaries but where their relationship as driver and passenger had been established at the Colorado university summer school which they were both attending. But the success of the law of the place of the special relationship was to be shortlived. In *Tooker* v. *Lopez*,[52] on very similar facts—New York-domiciled girls driving in Michigan where they had become university classmates—the same court, shortly before the judgment of the House was delivered in *Boys* v. *Chaplin*, overruled *Dym* v. *Gordon*, by a majority again of four to three, and applied the law of the common domicile.

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[46] 12 N.Y. 2d 473, 191 N.E. 2d 279, 240 N.Y.S. 2d 743 (1963); also reported at [1963] 2 Lloyd's Rep. 286. Less attention has been received by the earlier pioneering decision, along similar lines, of the Court of Appeal at The Hague of May 16, 1955, *Clunet* 1959, 507; *Nederlands Tijdschrift voor Internationaal Recht* 1956, 290.

[47] The abundance of American decisions has given rise there to a vast literature which cannot be catalogued here; for a particularly valuable recent work see Cavers, *The Choice-of-Law Process* (1965).

[48] Indeed in *Boys* v. *Chaplin* Diplock L.J. in the Court of Appeal, while unprepared to accept that the *lex loci delicti* should be displaced by reason solely of the fact that both plaintiff and defendant lived in England, was less positive as to what view he would have taken if, in addition, there had been a pre-accident nexus between the parties emanating from England: see [1968] 2 Q.B. 1, 44.

[49] This qualifying phrase is well illustrated by *Reich* v. *Purcell*, 63 Cal.Rptr. 31, 432 P. 2d 727 (1967) where the Supreme Court of California applied the law of Ohio in a wrongful death claim by members of an Ohio-domiciled family against a California-domiciled defendant arising out of a head-on collision in Missouri. Missouri imposed a limit on the recoverable damages, but neither Ohio nor California did.

And so we arrive finally at the one remaining—and probably most difficult—combination, of which *Boys* v. *Chaplin* is itself an illustration: no pre-accident nexus but a home country common to tortfeasor and victim. If the law of the jurisdiction of the common home is to prevail even if there is a pre-accident nexus established elsewhere, then *a fortiori* it should prevail in the absence of such a nexus. But if, in England, the result in *Dym* v. *Gordon* should be preferred to that in *Tooker* v. *Lopez*, then what should be the solution where there is no pre-accident nexus? Lord Hodson and Lord Wilberforce considered that in these circumstances the *lex loci delicti* could be displaced, and there is indeed a strong argument to be made for this solution on the basis that the country in which an accident takes place has no interest in having its own rules applied where none of the parties involved has any substantial connection with it. It cannot, however, be said that world opinion has crystallised in favour of this solution. The displacement of the *lex loci delicti* does indeed derive some support from Germany with its Decree of December 7, 1942, stipulating that German law should be applied wherever injury was inflicted outside Germany by one German citizen on another. But this Decree does not apply to persons other than Germans, being in origin a wartime measure of the Nazis—a political conqueror who has failed to subjugate the legal systems of the countries he has overrun is probably in need of some such rule—which has since been held by the Bundesgerichtshof to be still in force on the basis that it was not specifically Nazi-oriented.[53] Much more important, however, is the fact that the French Cour de Cassation in a decision of May 30, 1967 came to the opposite conclusion to that reached in *Boys* v. *Chaplin*, and applied German law so as to refuse recovery of *dommage moral* to the French father of a Frenchman killed by another Frenchman's negligence in an accident occurring in Germany.[54]

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[50] Art. 3 (b). See also the Hague Convention (*supra*, note 34), art. 4.
[51] 16 N.Y. 2d 120, 209 N.E. 2d 792, 262 N.Y.S. 2d 463 (1965).
[52] 24 N.Y. 2d 569, 249 N.E. 2d 394, 301 N.Y.S. 2d 519 (1969).

So far, it has been assumed that the geographical point of contact with tortfeasor and victim is the country in which each has his home, the jurisdiction of his residence, domicile and nationality. If, however, a person is a resident, a domiciliary, and a national of different jurisdictions, which of the three should have the strongest claim to control? [55] Probably the answer is to be found in a fourth category, that of " habitual residence," a concept which is used in the Draft Resolution of the Institut de Droit International.[56] It is also a concept familiar to English statute law, where it appears either as " habitual residence " [57] or, more commonly and especially in tax legislation, as " ordinary residence." [58] A mere residence for United Kingdom tax purposes should not suffice as a point of contact; applying such a test, presumably both plaintiff and defendant in *Boys* v. *Chaplin* would have been resident in Malta. Domicile is indeed the point of reference which is generally utilised in the American and Canadian decisions, but in both countries the concept of domicile is less rigid than in English law and is in fact nearer to the notion of habitual or ordinary residence. Nationality is of course of little value in a world in which a nation so commonly contains more than one legal system, and sometimes many.

So far also, it has been assumed that displacement of the *lex loci delicti* entails its total displacement. The Restatement Second, however, requires that each issue be examined separately,[59] and in this approach, as already indicated, has received the endorsement of Lord Wilberforce who, while prepared to decide, on the fact situation in *Boys* v. *Chaplin*, that the *lex loci delicti* should be displaced in relation to the issue of heads of damage, might not necessarily have agreed to its displacement had the issue been, say, the standard of liability. Probably the issues which have the strongest claim to be separated out from the rest in this way are those, whether concerning tortfeasor or victim, which appertain to family law and the law of succession as much as to tort law, so that it may be appropriate to decide them according to the law of the habitual residence of the relevant party even if in matters more central to tort itself the *lex loci delicti* continues to control. Take, for instance, the issue of the survival of claims against the estate. Few jurisdictions today deny the victim of a tort the right to sue the estate where the tortfeasor has died, but there are still small pockets of resistance to this clearly sensible rule.[60] Or again, take the issue of who can claim for loss of support where the victim of an accident has been killed. Here legal systems have adopted three different approaches in gauging the size of the circle of potential claimants: for some jurisdictions the fact of support is enough,[61] for others a legal entitlement to support must be shown,[62] while the remainder, in the middle, list by statute particular classes of relatives.[63] Should not then the issue of whether the estate can be sued be decided by the law of the deceased tortfeasor's habitual residence and the issue of how widely the circle of potential claimants is to be drawn by the law of the deceased victim's habitual residence? Thus on a fact situation like that which arose in *Boys* v. *Chaplin* itself, if the court thought it appropriate to apply the *lex loci delicti* to the issue of whether the plaintiff must show negligence to succeed, or even, as did Diplock L.J., to the issue of whether the plaintiff could recover for his non-pecuniary loss, questions concerning potential claimants and survival of actions could still be held to be governed by some other law. But any such subdivision into issues must certainly not be taken too far, and should in no circumstances be allowed to affect claims where the *lex loci delicti* is properly entrenched, in particular those where the accident occurs in the country in which either tortfeasor or victim is habitually resident. Thus if a fatal accident takes place in England, why should an English tortfeasor whose home is in England find himself laid open to a wider circle of claimants because the victim happened to be French? Equally, why should he be advantaged because the deceased happened to be German? And the like arguments hold also with the issue of survival of actions, so that there is no good reason why an Englishman, injured in England and habitually resident in England, should be prejudiced because the tortfeasor, now deceased, lived in a jurisdiction which still does not allow survival of actions against the estate.

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[53] BGH February 2, 1962, BGHZ 34, 222.

[54] Cass.civ. May 30. 1967, DS. 1967, 629 (reversing the Cour d'Appel de Paris).

[55] S. 145 (2) (c) of the Restatement Second specifies all three as points of contact without differentiation; the Comment, at pp. 12–13, is however phrased mainly in terms of domicile.

[56] Art. 3 (a). See also the Hague Convention (*supra*, note 34), Art. 4.

[57] Wills Act 1963, s. 1.

[58] Adoption Act 1958, s. 12. Key references in tax legislation are the Income Tax Act 1952, ss. 132, 156 (as amended), 368 and 412, the Finance Act 1962, s. 10, and the Finance Act 1965, s. 20.

[59] All the sections on torts, from s. 145 onwards, are framed in terms of particular issues.

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[60] The Bahamas and Dominica appear to have no survival statute; and see, for Aden, the Succession Ordinance (Laws 1955, c. 199), s. 277. This issue arose foursquare in *Grant* v. *McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953), a highly important decision of the Supreme Court of California.

[61] As in France; established early in Cass. crim. February 20, 1863, S. 1863. 1. 321.

[62] As in Germany: BGB § 844, par. 2, and § 845.

[63] As in England: Fatal Accidents Act 1846, s. 2, as extended by Fatal Accidents Act 1959, s. 1.

DISPLACEMENT OF THE LEX LOCI DELICTI BY THE PROCEDURAL LAW OF THE FORUM

In holding the damages issue in *Boys* v. *Chaplin* to be one of substance and not of procedure, their Lordships were able to adopt a distinction between heads of damages and quantification of damages and to classify the former as a matter of substance.[64] Having solved the immediate problem before them in this way, the borderline between substance and procedure had to be considered no further, and the result is that we are left with an acceptance by the House, really by way of dictum, of the proposition that matters of quantification are always matters of procedure. This however is too simplistic a solution, and it is suggested that even matters of quantification should generally be regarded as appertaining to substance rather than procedure.

We must grant that there are certain procedural considerations which do impinge upon the assessment and quantification of damages. Thus if a jurisdiction uses a system of trial by jury for claims for damages, as does New South Wales and as is the general pattern in the U.S.A., it cannot be expected to abandon this system for a judge-dominated one merely because the substantive law governing the tort would have the issue decided by a judge sitting alone. And it can make no difference to this result that it is generally thought that juries are more generous with awards of damages than are judges; no question of principle in relation to quantification is involved here. So too, if England still continues to insist that damages for loss of earning capacity and for loss of support must be awarded as a lump sum, her courts can give no heed to the fact that the *lex loci delicti* regards awards by way of periodical payments as obligatory, as does the Soviet Union,[65] or as the norm to be displaced by the lump sum only where there is a serious reason for making such an award, as in Germany.[66] This is made particularly clear if one looks further and takes into account that, where periodical payments are awarded, both plaintiff and defendant are generally entitled to come back to the court and ask for revision of the award should circumstances change.[67] Clearly, the English court is in no position to provide facilities of this nature, and must give its own form of remedy, although it need not throw up its hands and refuse all redress as did the U.S. Supreme Court, by a majority, in the once influential *Slater* v. *Mexican National Railroad Co.*,[68] an early example of an international accident.

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[64] The distinction has been long championed by Dr. Cheshire in his *Private International Law*, now appearing at pp. 602–608 of the 7th ed. (1965).

[65] Civil Code RSFSR (1964), art. 468; Byul. Verk. Suda RSFSR 1961 no. 5 p. 15.

[66] BGB § 843 par. 1 and 3; § 844 par. 2; § 845.

[67] Soviet Union: Civil Code RSFSR, art. 466 and 467; Germany: ZPO § 323.

But outside such matters which are clearly procedural, most issues of quantification appertain to substance. Take first the case of a ceiling placed upon damages by code or other legislation; should not this be considered as a matter of substance? In the common law world the conflicts problem has from time to time arisen because by the *lex fori* a contributorily negligent plaintiff was denied all claim, while by the *lex loci delicti* his damages merely fell to be reduced; in such circumstances the High Court of Australia rightly regarded the issue as one of substance in *Anderson* v. *Eric Anderson Radio and T.V. Pty.*[69] England has of course already adopted the modern solution of cutting down the remedy rather than cutting out the action, but what if the English court were faced with a tort committed in a jurisdiction which held the even more advanced view that a plaintiff was entitled to full recovery despite his own negligence? Could the fact that England wished to limit the damages now be classified as a matter of procedure? Surely not. And therefore the same should be true of any other limit placed upon full compensation of a plaintiff. Thus if England were to introduce by legislation, as the Law Commission is considering, a limited recovery for non-pecuniary loss in wrongful death claims because the total refusal, established very early,[70] appears today to be too callous—a step which has, for instance, been taken by Eire and Wisconsin, where the current limits are £1,000 and £1,250 respectively [71]—would the limit chosen by Parliament have to apply where the *lex loci delicti* would allow full recovery, as would the law of France? [72] Or again, moving from legislative ceilings to limits placed upon damages by the judges themselves, take the Court of Appeal's resolution of conflicting lower court decisions by holding that, where a victim's life expectation is cut down by the tortiously inflicted injury, the damages are to be based upon the plaintiff's post-accident rather than his pre-accident expectation of life.[73] Yet some other countries take the opposite view. At first sight the English solution appears to be a sensible one, designed not to overcompensate the victim merely in order to have the tortfeasor pay more, but it has this fatal flaw of ignoring the position of the victim's dependants. For it would have been out of his earnings in the years which have now been cut off that the means for their support would have come. It is therefore generally with the protection of the dependants in mind that other jurisdictions have insisted upon basing the damages to the still living victim upon his pre-accident life expectancy. Why then should English law impose her own rule upon countries which have deliberately chosen the pre-accident life expectation in order that dependants should not be left without support or legal claim, as has Australia recently [74] and Switzerland long since? [75] Or upon countries which, like Belgium, have a legal system sufficiently flexible to allow awards of periodical payments which are to continue, at a suitably reduced rate, after the victim's death in favour of his dependants? [76] Of course, the English rule would be vindicated if it were held that upon the victim's death his dependants could bring their own separate claims for damages; indeed this solution is still open to the English courts [77] and is endorsed both by German [78] and South African [79] practice and by a growing number of American decisions.[80] But even if it were adopted here—and it would appear to afford the best solution —it still does not justify an English court basing damages on the pre-accident expectation where the relevant law would use post-accident expectation as the only device available to it for safeguarding dependants.

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[68] 194 U.S. 120 (1904).

[69] (1966) 39 A.L.J.R. 357; [1966] Argus L.R. 423 (the *lex fori* nevertheless prevailed as the current English rule, requiring the substantive law of the forum to be satisfied, was applied). When this problem was still a live one in the U.S.A. before the spread of apportionment provisions, the issue was generally held to be one of substance rather than of procedure

[70] In *Blake* v. *Midland Ry.* (1852) 18 Q.B. 93.

[71] Eire: Civil Liability Act 1961, s. 49 (1) (*a*) and (*b*); Wisconsin: Ann. Stats. § 895. 04 (4).

[72] Mazeaud and Tunc, *Traité de la Responsabilité Civile*, Vol. I (6th ed., 1965), no. 317.

[73] *Oliver* v. *Ashman* [1962] 2 Q.B. 210 (C.A.).

A further illustration is afforded by the issue of whether damages should be awarded upon the basis of the plaintiff's earnings before or after tax. Since *British Transport Commission* v. *Gourley* [81] England has taken the view that an appropriate deduction must be made for the income tax and surtax which would have been payable on the plaintiff's salary. This makes sense, but only because the damages themselves are not taxed. In some countries they are—Sweden [82] and West Germany [83] are examples—so that, if English law were applied in this connection, the Swedish or West German plaintiff would have to return home with his truncated damages only to have them taxed upon arrival. And, beyond this, some countries—like France—legislatively exempt damages awards for personal injury from taxation in order to ensure that a windfall of sorts does come to the plaintiff, and that the state does not add insult to injury by levying an impost upon his compensation.[84] Should then the English court refuse to implement this policy?

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[74] *Skelton* v. *Collins* (1966) 115 C.L.R. 94 (High Ct. of Australia); see esp. Taylor J. at p. 121. In Canada the Supreme Court has reserved its opinion upon the propriety of using the post-accident life expectancy: *The Queen* v. *Jennings* (1966) 57 D.L.R. (2d) 644.

[75] See the decisions of BG October 9, 1895, BGE 21, 1042, esp. at p. 1048; BG October 26, 1904, BGE 30 II 486, esp. at 492; BG March 4, 1914, 40 II 68, esp. at p. 71.

[76] Cour Bruxelles October 26, 1960, J.T. 1961, 404 (60 per cent. to be paid to victim's widow unless defendant showed death to be from another cause).

[77] McGregor, "Compensation versus Punishment in Damages Awards," (1965) 28 M.L.R. 629, 647–648.

[78] *Cf*. Geigel and Geigel, *Der Haftpflichtprozess* (14th ed., 1969), p. 170.

[79] *Ex p. Oliphant* [1940] C.P.D. 537.

[80] See the jurisdictions cited by Prosser, *Handbook of the Law of Torts* (3rd ed., 1964), at p. 934, notes 30 and 31.

[81] [1956] A.C. 185.

[82] I *Geijer-Rosenqvist-Sterner Skattehandbook* (4th ed., 1957), p. 57.

[83] EinkommenSteuerGesetz § 24 (1) (a).

So far all the situations discussed have raised problems because the relevant English law has been more restrictive than the foreign law, but the converse position can equally well be illustrated. Take, for instance, the current English rule allowing a husband to claim damages for loss of consortium where his wife has been injured; this is presumably a matter of substance. But if the *lex loci delicti* puts a limit on such damages—as does Ethiopia [85]—will the English court say that it is now a question of quantification, ignore the limit, and apply its own rules so as to give full recovery? Or another illustration may be taken from the Soviet Union where damages for loss of earning capacity are limited to the plaintiff's flat-rate salary at the time of the injury, excluding from the calculation overtime and bonus payments [86] and also the probability, even the certainty, of future increases in salary.[87] If then the Soviet Union is prepared to afford compensation only to this extent, should not the English court defer to it if called upon to award damages to a plaintiff living there and injured there? Again, in the U.S.A. one of the commonest causes of recent litigation in this field has been the cleavage between the jurisdictions which allow wrongful death damages without limit and the jurisdictions—now fortunately decreasing in number nearly every year—which still insist upon placing a statutory ceiling upon awards, a ceiling which even today can fall below £15,000.[88] If an English court has to deal with a wrongful death claim for which the appropriate substantive law is that of New Hampshire, should not it apply rather than ignore the New Hampshire limit of £25,000? [89]

Yet procedural considerations may sometimes be relevant to the quantification of damages in an indirect and perhaps unexpected way. English law, in the last decade or so, has in general abandoned awarding punitive damages, has moved towards reducing damages on account of collateral benefits received by the plaintiff, and has required damages for loss of earning capacity to be calculated on the net salary after tax. Many other jurisdictions, however, continue today in the old ways. At first sight, it may seem that, on the basis of the above arguments, English law should defer, where appropriate, to the more generous assessments allowed by such jurisdictions. This, however, fails to take into account that these more generous assessments are made in order to ensure complete compensation to a plaintiff who, under what the Americans call the contingency fee system, is required to hand over a substantial part of his award to his own lawyer.[90] Since this procedure is looked upon askance in England, where a successful plaintiff's legal costs are reimbursed by the defendant although admittedly after being taxed down by the taxation master, the amount of the punitive award, of the collateral benefit, or of the part of the earnings which would go in taxation, would operate as a totally inappropriate windfall for the plaintiff.

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[84] Code Général des Impôts, art. 81-9°.

[85] Code Civil, art. 2115 (1) combined with art. 2116 (3).

[86] Budden, "Soviet Tort Law," 42 N.Y.U.L.Rev. 583 (1967) at p. 610.

[87] Ministerial regulation (S P SSSR 1961 15/119 S. 12) requires award to be calculated on claimant's average monthly earnings in the 12 calendar months preceding the injury.

[88] As in Colorado, Kansas and Minnesota, each with a current limit of U.S. $35,000.

[89] The majority of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526, 211 N.Y.S. 2d 133 (1961), also reported at [1961] 2 Lloyd's Rep. 406, did indeed ignore the Massachusetts limit where the New York domiciled family of the victim of a Massachusetts plane crash claimed damages from the airline on the ground that the measure of damages was a "procedural or remedial question controlled by our own State policies," but this approach was strongly criticised in the dissent of Froessel J. In any event the *lex fori* was there being applied more as a matter of public policy than as a matter of pure procedure by reason of the New York courts' dislike of statutory limits upon wrongful death damages. Of course this should not have sufficed to allow New York law to win the day; its most cogent claim to control was that it was the proper law.

And there are also bound to be situations where, however broad a view of substance one takes, it may be more appropriate to allow the quantification of the damages to remain a matter to be decided by the rules of the *lex fori*. Take the question of the level of awards which courts throughout the world see fit to make in favour of the victims of injury and death. The range is astonishingly wide. In a class of its own is the U.S.A. where there can be found awards of over £500,000 for personal injury.[91] In Europe France tops the list with a ceiling of £90,000,[92] England—at Court of Appeal level—stands at just over £50,000,[93] while Denmark comes near the foot at about £7,000.[94] Yet Denmark is generous compared with Mexico where damages cannot exceed just over £1,000 for injury and only two-thirds of this for death.[95] Such enormous disparities cannot be accounted for by the variation in the cost of living from one country to another, and are largely attributable to the degree of respect that a country has for the security of life and limb. How then should the English courts react to a claim in respect of an accident in California to a lifetime resident of California? Should they be prepared to award ten times the damages they would normally award for an English accident? It seems unlikely that they would: this, they would say, was procedure. Yet had the accident happened just south of the border, in the lower Californian peninsula which is within Mexican territory, it might be less easy to refuse to make an award in line with the Mexican law—which could be a mere 2 per cent. of what would have been the award for an English injury—because the Mexican limits do not result from judicial ungenerosity but are imposed by specific legislation.[96]

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[90] In a considerable number of U.S.A. jurisdictions the jury has long been instructed to take into account, in awarding punitive damages, the sum the plaintiff must pay over to his legal counsel (*e.g.*, *Titus* v. *Corkins*, 21 Kan. 722 (1879)) and Connecticut even makes this amount the limit of punitive recovery (*Craney* v. *Donovan*, 92 Conn. 236, 102 A. 640 (1917). In *McWeeney* v. *New York New Haven and Hartford RR. Co.*, 282 F. 2d 34 (2d Cir. 1960) at p. 38, the "countervailing factor" of the contingent fee was specifically put forward as a justification for basing the award on pre-tax earnings.

[91] In (1967) 11 *Personal Injury Newsletter* 18, a Californian award of U.S. $1,500,000 is unofficially reported; a 1967 Florida award of U.S. $1,400,000 is referred to in Kemp and Kemp (*op. cit.*, *supra* note 30) at p. xiii n. 29; in *Harvey* v. *Dow*, an unreported New Jersey decision of March 25, 1969, U.S. $1,200,000 was awarded.

[92] Cour Paris November 9, 1966, Gaz.Pal. 1967. 1. 100 (1,200,000 French francs).

[93] *Fletcher* v. *Autocar and Transporters* [1968] 2 Q.B. 322 (C.A.) (£51,500).

[94] See the awards listed in Jørgensen, *Erstatning for Personskade og Tab af Forsørger* (1963), esp. at pp. 319–361, none of which exceeds 100,000 Danish kroner. But these cases do not do not go beyond 1962, and today's top limit has reached 120,000 Danish kroner and over.

[95] Federal Civil Code, art. 1915, as altered by the Decreto of December 30, 1939 (*Diario Official* of January 20, 1940) limiting damages for pecuniary loss to the amounts specified in the tables contained in the Ley Federal del Trabajo for workmen's compensation; together with art. 1916 affording a correspondingly limited recovery for non-pecuniary loss.

It is tempting, faced with these perplexing problems, to cut loose from all notion of applying the *lex loci delicti* or other proper law, to abandon all attempt to keep procedural features to the practical minimum they deserve, and to hurry for the home-ground, the safety of the *lex fori*. The comfortable assertion can then be made that the parties have only themselves to blame for any prejudice they may suffer by suing in England: the claim should have been heard elsewhere, generally in the courts of the *locus delicti*. But this temptation must be resisted. The parties to the action cannot be made scapegoats in this way. For if the English court is prepared to accept that it has jurisdiction, the defendant for one is powerless to prevent its adjudication. As for the plaintiff, it is wrong to assume that any prejudice to him through the application of English law can be put down to a penchant for masochistic forum-shopping. For England may be the only feasible forum for him: if a Ruritanian is injured in Ruritania by an Englishman with assets only in England, the Ruritanian may have to track down his defendant to England in order to find a court with power to attach those assets, or even in order to obtain a court hearing at all if Ruritania has no equivalent to our Order XI procedure for serving writs upon persons out of the jurisdiction. Or England may be the most practical forum for him: this would be so if the Ruritanian, after the accident, had come to live, temporarily or permanently, in England. And in any event England should not attempt to make her courts unavailable to those who find it reasonable and convenient to sue here by erecting effective barriers to justice through an insistence upon applying her own law far beyond the limits demanded by her public policy.

HARVEY MCGREGOR.*

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[96] The local Code of Baja California, following the Federal, has similarly introduced a ceiling on the recoverable damages by reference to the tables in the Ley Federal del Trabajo: see Aguilar, *Panorama de la Legislacion Civil de Mexico* (1960) at p. 84.

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A TRANSATLANTIC INSPIRATION: THE " PROPER LAW OF THE TORT " DOCTRINE

LORD DENNING M.R.'s all-out endorsement of the " proper law of the tort " in the decision of the Court of Appeal in *Boys* v. *Chaplin* [1] has found but marginal support in the House of Lords. Of the five Law Lords who rendered the recent decision in *Boys* v. *Chaplin* [2] only two, Lords Hodson and Wilberforce, were prepared to accord the " proper law " doctrine the role of a subsidiary choice-of-law guideline.[3] The doctrine seems to fare better in English academic quarters [4] and one feels that *Boys* v. *Chaplin* may well prove to have been the first, hesitant if not reluctant, step towards its eventual transplantation into English tort choice of law. What are the origins and manifestations of this doctrine in its native environment, American conflict of laws?

THE " MOST SIGNIFICANT RELATIONSHIP " CONCEPT OF THE AMERICAN RESTATEMENT (SECOND)

Section 145 (1) of the American Restatement (Second), Conflict of Laws (Proposed Official Draft Part II, 1968) provides the following:

> " The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties. . . ."

Thus the new *Restatement* seeks to abandon the much deprecated *lex loci delicti* rule and substitute in its stead the " most significant relationship " concept.

The underlying reasoning of the " most significant relationship " concept can be traced back to the " proper law " doctrine traditionally espoused by English conflicts law in the sphere of multinational contracts.[5] This doctrine, in its " objectivist " version, is echoed by the corresponding theory of " centre of gravity " or

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[1] [1968] 1 All E.R. 283, 286–287. Upjohn L.J. and Diplock L.J. rejected the idea: *ibid.* at pp. 294, 301.

[2] [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085; (*sub nom. Chaplin* v. *Boys*). See also Lazar, "*Phillips* v. *Eyre* Revisited" (1969) 32 M.L.R. 688.

[3] *Ibid.* at pp. 1094, 1104. Lords Guest, Donovan and Pearson joined in the defence of traditional thinking, the latter—perhaps—less decidedly so: *ibid.* at pp. 1095, 1097, 1116.

[4] See Ehrenzweig, "The Not So 'Proper' Law of a Tort: Pandora's Box" (1968) 17 I.C.L.Q. 1, notes 1, 2; Kahn-Freund, Comment, "Conflict of Laws—Damages for Tort" (1968) 46 Can.B.R. 137; Webb, "Tort in the Conflict of Laws" (1967) 16 I.C.L.Q. 1145.

[5] See Ehrenzweig, "The Second Conflicts Restatement: A Last Appeal for its Withdrawal" (1965) 113 U.Pa.L.Rev. 1230, 1241; Leflar, "Choice-Influencing Considerations in Conflicts Law" (1966) 41 N.Y.U.L.Rev. 267, 269; Leflar, *American Conflicts Law*, p. 220 (stud. ed., 1968).

" grouping of contacts " developed in the United States, under the leadership of the New York Court of Appeals, first in the field of contracts and subsequently in tort cases.[6] The latter theory advocates the application of the law of the place having " the most significant contacts with the matter in dispute," or " the most interest in the problem," or the " strongest connection " to the issue at bar. It is noteworthy that almost two decades ago a prominent English conflicts scholar vigorously urged the transplantation of the " proper law " doctrine into the area of torts.[7] In sum, the popular formulas of " proper law," " centre of gravity," " grouping of contacts," and " most significant relationship " represent essentially the same kind of thinking and hence may be referred to interchangeably.

Traditional choice-of-law rules are relatively few in number and broad in scope, designed as they are to cover symmetrically the classical topical categories of law. In sharp contrast, the " most significant relationship " approach is issue-oriented.[8] Freed from the compulsion of the exclusive-legislative-jurisdiction dogma, it strives to break up the conventionally stereotyped groupings of " tort," " contract," " property," etc. questions and to proceed on an issue-by-issue basis.[9] Overgeneralised categorisations thus give way to a realistic separation of issues and a narrowing down of problems for decision. The traditional preoccupation with the idea of an easy, semi-automatic procedure for conflicts adjudication is finally exposed as an unwarranted illusion.[10] This growing quest for particularisation in the choice-of-law process introduces into traditional conflicts thinking a fresh, progressive element. Aside from the fact that it marks an openly admitted departure from rules of the *lex loci delicti* calibre, in the long run it may indeed prove to have helped to clear the way for a more rational choice-of-law methodology.

The emphasis on thinking in terms of concrete issues, featured in the Restatement Second and its methodological ancestors and disciples, is coupled with a campaign for ever more numerous and detailed choice-of-law rules.[11] Unlike their traditional counterparts, the new rules must be carefully articulated with narrowly defined fact-situations in mind. To be sure, the process by which such rules are to be worked out is a long, gradual one. One should contemplate an elaborate, patient, case-by-case course of construction on the basis of past, present and future judicial practice.

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[6] See, *e.g.*, *Auten* v. *Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954); *Babcock* v. *Jackson*, 12 N.Y. 2d 473, 191 N.E. 2d 279 (1963); *Gore* v. *Northeast Airlines Inc.*, 373 F. 2d 717 (2nd Cir. 1967); Castel, Book Review, Ehrenzweig, " Conflict of Laws " (1964) 42 Can.B.R. 331, 334.

[7] Morris, " The Proper Law of a Tort " (1951), in *Selected Readings on Conflict of Laws*, pp. 575, 580 (compiled by the Association of American Law Schools, 1956—hereinafter referred to as *AALS Readings*). His " proper law of the tort " thesis is enthusiastically supported by Childers, " Toward the Proper Law of the Tort " (1962) 40 Texas L.Rev. 336, 339.

[8] The Restatement Second, writes Reese, its Reporter, ". . . seeks to draw distinctions . . . between different issues pertaining to torts. . . .": " Discussion of Major Areas of Choice of Law " (1964–I) 111 *Recueil des Cours* 315, 414.

[9] The origins of this idea can be found in Cook's writings: see " An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws " (1943), in *AALS Readings*, pp. 97, 100.

[10] See Leflar, " Comment on *Babcock* v. *Jackson* " (1963) 63 Colum.L.Rev. 1247, 1249.

When one comes to appraise the merits of the methodology of the Restatement Second, the key factor for consideration is its conception of how "contacts" or "relationships" relate to the purposes behind the specific laws entangled in conflicts situations. Law is best understood in terms of community standards pertaining to the regulation of human activities and relationships. Whether statutory or judge-made in origin, they are generally assumed to express relevant social concerns or public interests, be they "public policies," "governmental interests," "principles of justice" or otherwise. Hence the application of the legal standards adopted by a community entails, indeed requires, a constant probe into reasons, objectives, underlying policies and principles. The proper reach of a legal standard in terms of subject-matter, time, space, and persons covered should not be defined by analytical deductions from *a priori* postulates of territorial limitations on legislative power. Rather, the appropriate scope of application to be accorded a legal standard is a direct function of its underlying purpose—this is both functionally sound and fair to the parties involved.[12]

Starting from the premise that rules of law usually embody public interests, it clearly follows that jurisdictions whose respective laws are implicated in a conflicts situation may have at least a potential stake in the outcome of the controversy.[13] Hence it would be irrational, indeed perverse, to impose upon a forum handling a choice-of-law case a rigid obedience to a set of mechanical conflicts directives of the *lex loci delicti* type. To do so would be tantamount to forcing it to apply or reject rules of law in deliberate ignorance of their underlying public interests. Such judicial behaviour would amount, in effect, to resolving disputes through the invocation of legal standards in complete indifference to their intended functional scope of coverage. A court subscribing to this kind of a judicial pattern may end up randomly applying a law which does not represent any public interest relevant to the instance at bar, or brushing aside out of hand a rule which is manifestly material in the light of the policy embodied in it. This would be both irrational in terms of the public interests involved and at times unfair to the individual litigants.[14]

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[11] See Reese, "Conflict of Laws and the Restatement Second" (1963) 28 *Law & Contemp. Prob.* 679, 681; Drion, "The *Lex Loci Delicti* in Retreat," in *Festschrift für Otto Riese*, 233 (published by C. F. Muller, Karlsruhe, 1964).

[12] See Kramer, "Interests and Policy Clashes in Conflict of Laws" (1959) 13 *Rutgers L.Rev.* 523, 534; Katzenbach, "Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law" (1956) 65 Yale L.J. 1087, 1131–1132.

[13] Cheatham and Reese, "Choice of the Applicable Law" (1952) 52 Colum.L.Rev. 959, 972.

It follows that a functional analysis of the specific policies or principles, *i.e.*, public interests, implicated in a given conflicts situation, with a view to determining the possible impact thereon of deciding the case one way or another, is an indispensable part of a rational choice-of-law process. That is, the underlying purposes of the specific legal standards, local and foreign, involved must count in the allocation of significance to contacts and relationships. Otherwise, the celebrated " grouping " of contacts turns into a quantitative enumeration, as distinct from a qualitative evaluation, seeking to isolate the place having the preponderance of contacts grouped in it.[15] All factual contacts detectable through a superficial examination of the situation at hand are indiscriminately assembled together in one pool, with no rational criteria for distinguishing between relevant and irrelevant ones, or for weighing their relative substantiality in the particular circumstances.[16] As a result, " significance " is allotted in an arbitrary, mechanical manner with no regard for the real interests at stake. The jurisdiction " most concerned " is singled out on the basis of an often meaningless accumulation of connecting links, whatever the particular tenor and supporting purposes of its relevant legal standard may be. To repeat: a rational choice-of-law method must call for a forthright consideration of the specific content of the legal rules, local and foreign, involved as a focal factor for the evaluation of the significance of any particular contact to the issue at bar.

BOYS v. CHAPLIN REVISITED

An investigation of the specific law-fact pattern displayed in *Boys* v. *Chaplin* wholly vindicates the result reached by the House of Lords. The pertinent facts of the case are as follows: the plaintiff suffered serious injuries in a traffic collision admittedly caused by the negligent driving of the defendant. The accident occurred in Malta where the parties, both of them Englishmen serving in the British armed forces, were then stationed. The defendant's vehicle was fully insured against liability for damages with an English insurance company. Under the relevant law of Malta, a tort victim is entitled to recover only the direct financial loss suffered. This would cover expenses incurred and the amount of wages actually lost, plus a sum in respect of anticipated future loss of wages. The damages to which the plaintiff would be entitled according to this strict standard amounted, in the circumstances, to an agreed sum of £58. By contrast, the corresponding English rule is much more liberal and allows recovery of general damages, that is, compensation for pain and suffering and loss of amenities of life in addition to special damages for pecuniary loss. The general damages recoverable by the plaintiff under the English rule were assessed at £2,250. The English forum decided to apply the English rule and awarded the plaintiff a total sum of £2,808 in damages.

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[14] See generally Currie, *Selected Essays on the Conflict of Laws* (1963); Cramton and Currie, *Conflict of Laws*, pp. 203–334 (1968).

[15] See *Bowles* v. *Zimmer Mfg. Co.*, 277 F. 2d 868 (7th Cir. 1960); Ehrenzweig, " Comment on *Babcock* v. *Jackson* " (1963) 63 Colum.L.Rev. 1243, 1244. *Cf.* Note, " Products Liability and the Choice of Law " (1965) 78 Harv.L.Rev. 1452, 1459.

[16] See Cavers, *The Choice-of-Law Process*, p. 88, note 44 (1965).

As already observed, an interest analysis, *i.e.*, an analysis of the underlying rationale of the Maltese and English positions on the matter in dispute, bears out the outcome of the case. The standard of damages subscribed to by Malta, in effect, leaves the " cost " of pain and suffering with the party initially bearing it, the victim. Pain and suffering are items of damage which are essentially hard to convert into terms of money, since they lack a readily ascertainable market value. The built-in vagueness of these items generates widely divergent, and hotly contested, claims for compensation, which entail a time-consuming and expensive presentation of complex evidence. Judicial valuations are, by hypothesis, difficult and costly. They are essentially the product of guesswork, and not infrequently they result in overcompensation and tend to encourage fraudulent or tenuous claims. Also, the deterrent effect of pain and suffering on potential victims is conceivably the same whether such items are compensatable or not. That is, people are presumably affected in their behaviour by the mere prospect of bearing pain and suffering, whether or not they will be compensated for it. In brief, the cumbersome and dubious enterprise of attaching money value to pain and suffering is not worth its costs.

If these are the reasons behind the standard in question, does Malta really have an interest in its application to the case at bar? The main concern of the standard is the cost of tort law administration. Malta's only connection with the case is the fact that the accident occurred within its boundaries. Its adjudicatory machinery is not involved. Further, resort to this standard cannot be said to serve the end of cutting down the number of car accidents in Malta. From the standpoint of victims, compensation for pain and suffering is unlikely to affect their conduct in a way leading to more accident-prone behaviour. As previously noted, the deterrent value of pain and suffering seems not to depend on the factor of compensation. From the standpoint of injurers, liability in damages for the infliction of pain and suffering is bound to deter, not encourage, accident-causing activities. Finally, the possible intention of protecting injurers from excessive liability is irrelevant in a case where both the defendant and the forum are English. In conclusion, there is no conceivable basis for an assertion of interest by Malta in the application of its law.

The English rule of general damages is grounded in a notion of justice. Its principal concern is fairness to the injured party. It expresses the conviction that compensation only for medical expenses and loss of income is frequently inadequate. The effect of an injury on a person's dignity must also be taken into account if the community really seeks to compensate victims equitably. This is so even if the injury does not cause substantial or ascertainable economic loss,[17] and particularly where a person's dignity has suffered considerably. Society may feel that some money value ought to be attached to significant loss of this kind, whatever the administrative costs. Compensation for pain and suffering is a means to this end.[18]

The economic loss of the plaintiff serviceman in this case is indeed minimal. But the lasting effects of the injury, including partial deafness and facial paralysis, are consequential. Justice, under the English view, requires compensation above the out-of-pocket loss of £53. Also, the burdening of injurers with financial responsibility for the pain and suffering they cause could lead to some reduction or modification of accident-causing activities in which Englishmen partake. England, being the forum of litigation and the home jurisdiction of both parties, has a clear interest in the application of its general damages rule.

Boys v. *Chaplin*, then, presents a false, non-existent conflict between the laws of Malta and England. False conflicts are instances where the forum, after having examined all potentially relevant interests, arrives at the conclusion that only one jurisdiction is in truth concerned with the matter. This will occur where, as here, the standard subscribed to by only one connected jurisdiction is supported by a policy or principle which would be significantly furthered if the standard is applied to the case at bar. Consequently, the interest of that particular jurisdiction can be vindicated without any impairment to the policies or principles espoused by any other connected jurisdiction.[19]

A final note on the fairness of the result in *Boys* v. *Chaplin* as regards the defendant, or his insurer. It goes without saying that in every case entailing foreign elements one encounters at least two individual parties whose conflicting claims need to be justly adjudicated. An approach strictly focusing on public interests is prone to overlook or underplay a fundamental problem present in many choice-of-law situations: the reasonableness or fairness of a proposed appraisal of human conduct by foreign legal norms. This dilemma, typical of conflicts contexts, emanates from a general reluctance to engage in what may sometimes be regarded as an unfair process of judging conduct according to the legal standards of a foreign community. A widely recognised jurisprudential principle calls for a rational connection between the parties to a dispute and the legal standards by which their conduct is to be judged as a threshold guarantee of elementary justice in the judicial process.[30] The criterion for the ascertainment of such a proper connection is ultimately derivable from the sense of reasonableness and fairness possessed by the tribunal adjudicating the cause. Such a criterion may invoke the concepts of, among others, "submission and consent," "foreseeability," "vindication of justified expectations," "responsibility to ascertain foreign law," "reasonable reliance," and "fair notice."

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[17] *e.g.*, a typist recovering rapidly from a loss of a leg and suffering merely a temporary loss of earnings; an injured infant with no projectable economic loss.

[18] See Blum and Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, pp. 35–36 (1965).

[19] Currie, *supra*, note 14, at pp. 163, 184, 189. See Baxter, "Choice of Law and the Federal System" (1963) 16 Stan.L.Rev. 1, 8.

Returning to the case under discussion, it is evident that the defendant, an English national and domiciliary, cannot present a good argument in terms of lack of rational connection with English tort compensation law. He cannot possibly claim that he lacked "foreseeability" or "fair notice" as to the applicability of English law, or that he "submitted" to or "relied" on Maltese law when driving his car negligently in Malta. In conclusion, a calculus of both the public interests and the private equities at stake in *Boys* v. *Chaplin* points in the same direction—the English rule of general damages ought to prevail.

AMOS SHAPIRA.*

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[30] Katzenbach, *supra* note 12, at p. 1094, note 30.

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THE FIDUCIARY CONCEPT AS APPLIED TO TRADING BY CORPORATE "INSIDERS" IN THE UNITED STATES *

By now any essay on the regulation of securities that is directed by an American writer to British readers can presumably start with a number of assumptions:

First, British company lawyers—at least the academic variety—know the Securities and Exchange Commission as something more than a multi-tentacled monster with its head in Washington and the oddly vinous initials, SEC.

Secondly, American corporation lawyers—at least the academic variety—realise that the totality of the SEC's regulatory apparatus cannot be compared merely to the relevant provisions of the British Companies Act, together with the Prevention of Fraud (Investments) Act, but must include as well the Stock Exchange regulation and the informal controls exercised by such institutions as the Issuing Houses Association—although, now that the " City Code " has developed almost as many variations as Brahms did on a theme by Haydn, an American might be forgiven for wondering whether the British genius for unwritten law that is so admired in the United States will in the end prove adequate to the task.

Thirdly, slavish imitation even between countries as alike in their legal and financial institutions as the United Kingdom and the United States is to be avoided. There is little use, for example, in talking of shareholder action as a major deterrent in a country whose Bar views as anathema the contingent fee that has made viable instruments out of both the shareholder's derivative suit and the non-derivative class action in the United States. This is simply noted as a basic fact without implying a value judgment on either the British or the American fee system.

If the agitation with respect to takeover bids is put to one side, it seems clear that the critical complex of problems today on both sides of the ocean is that conjured up by the phrases " insider trading " and " the fiduciary concept " as applied to management and controlling shareholders. It is true that the keynote of the American Securities Act of 1988—disclosure—was borrowed from the British Companies Act, though with some peculiarly American emendations like advance examination of prospectuses. It is true also that the Securities Exchange Act of 1984 expanded the disclosure philosophy. From the beginning that statute (1) has required securities that are listed on a stock exchange to be registered with the SEC, (2) has imposed annual and other reporting requirements (with certified

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* This article is based on a talk given at the " Workshop on Company Law " directed by Professors Gower and Wedderburn at the Institute of Advanced Legal Studies, July 14, 1969.

financial statements) on their issuers, (3) has regulated proxy solicitations with respect to those securities, and (4) has imposed reporting and other restrictions on trading by directors, officers and 10 per cent. shareholders. Then a 1964 amendment extended all those provisions to unlisted equity issues with 500 holders of record when the issuer has at least $1 million of gross assets. Nevertheless, if the 1934 statute has developed a dominant theme, it is not so much disclosure as market egalitarianism. This is seen in two aspects—the prevention of market manipulation and the regulation of insider trading.

The matter of manipulation and stabilisation of the securities markets may be left to another occasion.[1] So far as attitudes toward insider trading are concerned, the basic change from the turn of the century to 1933 may be exemplified by two quotations. In 1900 there was this " far away and long ago " exchange between a member of the so-called Industrial Commission—to which Congress had given the not immodest task of investigating and recommending legislation with respect to immigration, labour, agriculture, manufacturing and business—and the President of American Sugar Refining Company [2]:

> " Q: You think, then, that when a corporation is chartered by the State, offers stock to the public, and is one in which the public is interested, that the public has no right to know what its earning power is or to subject them to any inspection whatever, that the people may not buy this stock blindly?
>
> A: Yes, that is my theory. Let the buyer beware; that covers the whole business. You cannot wet nurse people from the time they are born until the time they die. They have got to wade in and get stuck, and that is the way men are educated and cultivated."

Thirty-three years later, in the debates on the Bill that became the Securities Act of 1933, Representative Rayburn—then Chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, which had held hearings on the Bill, and later Speaker of the House—stated [3]:

> " The purpose of this bill is to place the owners of securities on a parity, so far as is possible, with the management of the corporations, and to place the buyer on the same plane so far as available information is concerned, with the seller."

Even today there are discordant notes. A distinguished professor of law with a background in economics as well argues that the exploitation and sale of valuable information are necessary as a method of compensating entrepreneurs, so as to guarantee the uninterrupted flow of entrepreneurial abilities into business enterprise; that nobody is really hurt when insiders market valuable information; and that, far from there having been any economic demonstration of the evils of insider trading, it is affirmatively a good thing. Indeed, with how much conscious hyperbole one cannot say, he suggests that an insider who does not want to or cannot afford to buy on inside information should be able to sell his information in the market place—an idea that should make " the nineteenth hole " an even more popular spot than it now is.[4]

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[1] See 3 Loss, *Securities Regulation* (2d ed., 1961, Supp. 1969), Chap. 10.

[2] Industrial Com., *Preliminary Report on Trusts and Industrial Combinations*, H.R.Doc. No. 476, 56th Cong., 1st Sess. (1900) Part I, p. 128.

[3] 77 Cong. Rec. 2918 (1933). "The essential objective of securities legislation," according to high judicial authority, "is to protect those who do not know market conditions from the overreachings of those who do." *Charles Hughes & Co. Inc.* v. *SEC*, 139 F. 2d 434, 437 (2d Cir. 1943), cert. denied, 321 U.S. 786; see also *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 848, 851 (2d Cir. 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U.S. 976.

This analysis is not without a certain refreshing quality. And to some extent it is aided and abetted by the economists' shoptalk in terms of the " perfect market." [5] But the defect of this approach is its apparent scorn for the moral element. Although insider trading on undisclosed information may not present a threat of the same magnitude as market manipulation in the sense that the former practice does tend marginally to force the price in the right direction, it constitutes an even more grievous insult to the market in the sense that the very preservation of any capital market depends on liquidity, which rests in turn on the investor's confidence that current quotations accurately reflect the objective value of his investment.[6] The lawyers's adage that it is important for the *courts* to *appear* to do equity might well be borrowed by the economists with reference to the *markets*. For there can be no doubt that the public today thinks of both the market pool and the insider trading coup as aspects of Nineteenth Century capitalism that are on a par with sweatshops and David Copperfield. Witness the Segré Report, which stated that one of the objectives of the European Economic Community was " to make sure that all persons carrying out a stock-exchange operation are on an equal footing," and took it as an underlying principle that,[7]

> " As regards the restrictions to be placed upon the executives' or directors' freedom of action, these should essentially aim

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[4] Manne, *Insider Trading and the Stock Market* (1966); see also Hetherington, "Insider Trading and the Logic of the Law" [1967] Wis.L.Rev. 720; Demsetz, "Perfect Competition, Regulation, and the Stock Market," in Manne (ed.), *Economic Policy and the Regulation of Corporate Securities* (1968), pp. 11–16.

[5] See generally Manne (ed.), *Economic Policy and the Regulation of Corporate Securities* (1968). For an analysis of the classical economic theory that is said to make insiders "beneficial speculators," see Wu, "An Economist Looks at Section 16 of the Securities Exchange Act of 1934 " (1968) 68 Colum.L.Rev. 260. Professor Wu tentatively concludes that " speculative trading by insiders may be beneficial in an 'economic' sense "; that the economic costs of discouraging short-term insider trading should be considered along with the fundamental principle of full disclosure; and that, " In the long run, the best protection of investors and the public is the efficient operation of capital markets and a properly functioning economy." *Ibid.* at p. 269.

[6] See Comment, "Insider Trading on the Open Market: Nondisclosure and *Texas Gulf Sulphur* " (1969) 42 So.Cal.L.Rev. 309, 313–314.

[7] EEC Com., *Development of a European Capital Market* (1966), p. 249.

at preventing them from using information acquired by virtue of their office to trade in the company's securities to their own advantage, before such information has become public knowledge."

In short, the female law student may have had a healthier reaction to insider trading than her professor when she stamped her foot and declaimed, "I don't care; it's just not right." [8]

Actually, the SEC statutes (more specifically the Securities Exchange Act of 1934) say very little about insider trading and nothing at all about the fiduciary position of directors and controlling shareholders.

Section 16 of the 1934 Act is the section specifically directed to insider trading. Section 16 (a) requires every director or officer of a company with a registered equity security, as well as every beneficial holder of 10 per cent. of any class of registered equity security, to file monthly reports with the SEC indicating any changes in his beneficial ownership. This much should not sound too foreign to British readers. But section 16 (b) is apt to be viewed as a typical example of "native American radicalism." That section permits recapture by the company (essentially on a constructive trust theory) of any profit realised by any person within section 16 (a) from a purchase and sale (or a sale and purchase) of any equity security of his company within less than six months; and, if the company does not sue for the profit, any security holder may bring an action in the company's name. There is no requirement that the plaintiff show any use of inside information. Recovery is automatic; usually there is nothing to litigate. The substantial amount of case law is directed to such extraordinary questions of construction (inevitable in any statute, however objectively drafted) as whether a merger or conversion involves a "purchase" or "sale," whether an insider's investment banking partnership that has traded (or the insider himself in such a case) is liable for the firm's entire profit or only for that portion represented by the insider's interest in the partnership,[9] and when a purchase occurs (and at what price) in the case of an option.[10]

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[8] Manne, *Insider Trading and the Stock Market* (1966), p. 15, and Chap. 1, n. 42. For replies to the Manne thesis, see Painter, book review (1966), 35 Geo.Wash. U.L.Rev. 146; Kripke, book review (1967) 42 N.Y.U.L.Rev. 212; Schotland, "Unsafe at Any Price: A Reply to Manne, *Insider Trading and the Stock Market*" (1967) 53 Va.L.Rev. 1425, quoted in *Diamond* v. *Oreamuno*, 29 A.D. 2d 285, 287–288, 287 N.Y.S. 2d 300, 303 (1st Dept. 1968), affirmed 24 N.Y. 2d 494, 248 N.E. 2d 910 (1969). That case, in which the highest court of the State of New York sustained the complaint, was a shareholder's nonstatutory derivative action for an accounting in which the plaintiff alleged that two of the directors (who were, respectively, the chairman of the board and the president) had sold 56,500 shares of stock in the market on the basis of inside information that the corporate earnings for August 1966 would be sharply reduced, and that the bid price had fallen from the area of 24–29 to 11 after the publication of the earnings figures. The Appellate Division emphasised that the defendants were "being charged because they converted into money to their own use something belonging not to them but to their corporation—inside information." 29 A.D. 2d at at p. 288, 287 N.Y.S. 2d at pp. 303–304. And Chief Judge Fuld in the Court of Appeals said: "It is true that the complaint before us does not contain any allegation of damages to the corporation but this has never been considered to be an essential requirement for a cause of action founded on a breach of fiduciary duty." 24 N.Y. 2d at p. 498, 248 N.E. 2d at p. 912. See also *Brophy* v. *Cities Service Co.*, 31 Del.Ch. 241, 70 A. 2d 5 (Ch. 1949), (1950) 63 Harv.L.Rev. 1446; *cf.* *Mosser* v. *Darrow*, 341 U.S. 267 (1951) (court surcharged a trustee in bankruptcy for profits derived by two of the debtor's employees from trading in securities of its subsidiaries, although he had considered their services indispensable and had expressly agreed that they could continue to trade and there was no hint of personal profit on his part). Professor Gower has cited the *Brophy* case in support of the view he has long held that principles of agency law are sufficiently elastic to enable a company to recover from a director any profit he has made on share dealings as a result of the misuse of confidential information, although apparently no English company has yet had the temerity to make such a claim. Gower, *The Principles of Modern Company Law* (3rd ed., 1969), p. 547. Nevertheless, British lawyers will readily recognise the building blocks that are at hand. *Cf.* *Parker* v. *McKenna* (1874) L.R. 10 Ch.App. 96; *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378 (H.L.); *Zwicker* v. *Stanbury* [1953] 2 S.C.R. 438, [1954] 1 D.L.R. 257; *Boardman* v. *Phipps* [1966] 3 All E.R. 721 (H.L.); more generally, *cf.* also *Reading* v. *Att.-Gen.* [1951] A.C. 507.

Whatever the reason, the recapture concept of section 16 (b), as distinct from the disclosure requirement of section 16 (a), has not turned out to be an exportable product. Apparently the only other countries that have anything at all comparable are Japan (which inherited the provision as one of the blessings of defeat), Pakistan (whose Securities and Exchange Ordinance 1969 was based on a draft prepared by the author at the request of the International Bank),[11] and the Philippines (which presumably acted under American influence).[12] Indeed, one of Japan's leading experts wrote in 1963 that the underlying theory of the recapture legislation was "so foreign to Japanese thinking about the nature of the corporate structure and the relationship between management and shareholders that no shareholder has ever used this remedy"—all of which presumably accounted for a 1953 amendment that deleted the reporting provision and "blunted this weapon in the shareholders' arsenal beyond all effectiveness."[13]

The closest analogue otherwise may be found in the Ontario Securities Act of 1966, which has been followed in a number of other Canadian provinces: Any director, officer or 10 per cent. beneficial holder who in fact uses confidential information for his own benefit in connection with a transaction in the company's securities is accountable to the company, *if the information might reasonably be expected to affect materially the value of the securities*, for any direct benefit or advantage received or receivable. This applies equally to any " associate " of any such person. And, on application by any owner of capital securities, a High Court judge, if he has " reasonable grounds for believing that the corporation has a cause of action " and it has failed to prosecute diligently, may make an order, on such terms with respect to security for costs and otherwise as he considers fit, requiring the Ontario Securities Commission to commence or continue an action in the company's name.[14]

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[9] *Blau* v. *Lehman*, 368 U.S. 403 (1962).

[10] On s. 16 (b) generally, see 2 Loss, *op. cit.*, *supra* note 1, c. 6C.

[11] In the event of a profit within less than six months, the officer, director or 10 per cent. beneficial holder must make a report and tender the amount of the gain to his company. If he does not do so, or if the company fails to recover any such gain within six months after its accrual or sixty days after a demand, whichever is later, the gain vests in the Government. Ordinance No. XVII of 1969, §12.

[12] Securities Act, Com. Act No. 83 (1936), § 26, reprinted in *A Compilation of Philippine Commercial Laws* (4th ed., 1961), p. 501.

[13] Yazawa, "The Legal Structure for Corporate Enterprise: Shareholder-Management Relations under Japanese Law," in von Mehren (ed.), *Law in Japan: The Legal Order in a Changing Society* (1963), pp. 547, 557. Professor Yazawa went on to say that the deletion of the reporting provision was regrettable, since some abuses of insider position had been recently reported in the Press. *Ibid.*

The Jenkins Committee was no more receptive to the idea of the American section 16 (b), although it did recommend that a director who actually used inside information should be liable to his company for any profit made by him and any damage suffered by the company [15]—a suggestion not incorporated in the Companies Act 1967. And it is too early to assess the provision that was added to the French Companies Act of 1966 when the *Commission des opérations de bourse* was created in September 1967, to the effect that the courts may order payment to a company of any profits realised from unreported stock exchange transactions by designated insiders, as well as the publication of their judgments (or extracts) in designated newspapers.[16]

[14] Ont., 14 & 15 Eliz. 2, c. 142, Part XI, esp. §§113–14 (1966); see also Alta., 16 Eliz. 2, c. 76, Part 11 (1967); B.C., 15 & 16 Eliz. 2, c. 45, Part XI (1967); Man., 17 Eliz. 2, c. 57, Part XI; Sask., 16 Eliz. 2, c. 81, Part XII (1967). An "associate" of a person is (1) any company of which that person beneficially owns, directly or indirectly, more than ten per cent. of the voting shares, (2) any trust or estate in which he has "a substantial beneficial interest" or as to which he serves as trustee or in a similar capacity, or (3) any relative, spouse, or spouse's relative who has the same home. Ont. §1 (1); see also Alta. §2 (1) 1; B.C. §2 (1); Man. §1 (1) 1; Sask. §2 (1) (a). On insider trading in Canada, see generally Williamson, *Supplement to Securities Regulation in Canada* (1966), Chap. 14. On the 1966 reforms in Ontario, see Wortsman, "The Insider/A Survey in Corporate Disclosure" (1968) 26 U. Toronto Fac. of L. Rev. 55. The Ontario legislation followed the recommendations of the Kimber Report, which found that the disclosure requirement that had been added to the Canada Corporations Act in 1965 (13 & 14 Eliz. 2. c. 52, §98) had "proved ineffectual in meeting the problems of insider trading." *Report of the Attorney-General's Committee on Securities Legislation in Ontario* (1965), §2.14; see generally *ibid.*, Part II, esp. §§2.26–29, discussed in Crawford, "Insider Trading" (1965) 8 Can.B.J. 400.

[15] Cmnd. 1749 (1962), paras. 90, 99 (c).

[16] Art. 465–1. The designated insiders are the chairman, directors and general managers (*directeurs généraux*), the members of the *conseil de surveillance* and of the *directoire*, and those employees whom the Commission declares to have access to inside information regarding the company's technical, commercial or financial operation. This requirement extends to the shares of parents, subsidiaries and affiliates, and it covers shares owned by the specified insiders' wives (unless separated) and unemancipated minor children as well. Moreover, every acquisition or disposition of shares by any such person must be reported to the Commission for publication. And a new Article 162–1 of the Companies Act of 1966 requires, within a time to be fixed by decree, that the shares of these insiders in publicly quoted companies be placed in registered form. *Loi sur les sociétés commerciales*, July 24, 1966, [1966] J.O. 6402, [1966] J.O.P. III, 32197, 32869, 32428; Ordonnance no. 67–833, Sept. 28, 1967, [1967] J.O.P. III, 33455.

By contrast with its limited exportability, section 16 (b), along with the reporting provision in section 16 (a), was substantially enhanced by Congress in 1964 when the registration requirement of the Securities Exchange Act of 1934 was extended to include unlisted companies with $1 million of assets and 500 shareholders—an extension that has far-reaching philosophical implications in that this registration requirement is not one that a company can avoid by failing to go to the public or to list on an exchange. Moreover, section 16 (b) has been most effective. Since the elements of the cause of action are so simple, one may infer (1) that the section, now that a fair number of corporate insiders have felt its bite, has been a considerable deterrent, and (2) that an insider who does find himself a potential defendant is apt to conclude that he has no practicable alternative but to pay up. Certainly the provision, in so far as it *has* been the subject of litigation, has received a sympathetic reading by the courts—though, here again, a British audience must be reminded that the efficacy of the remedy rests on the institution of the contingent fee, whose allowance the courts have accordingly said "must not be too niggardly." [17]

In the past decade or so, nevertheless, section 16 (b) has been upstaged. The major villain of the insider trading piece today is a dark horse, of dubious pedigree but very fleet of foot, named Rule 10b-5.[18] How that came to be is itself a mystery at least as awe-inspiring as the British Commonwealth—and possibly just as fragile, since the Supreme Court has yet to speak squarely to the rule. However far the United Kingdom may venture down the American path, and in whatever manner, the one prediction that may freely be made is that in this respect it will not follow the peculiar concatenation of events in the United States. Yet—apart from the story's being a fascinating example of jurisprudential development through the interaction of the legislative, administrative and judicial processes—one could not begin to describe some of the problems that the American courts are now grappling with unless he were first to relate how the Americans got where they are.

The story, as always, must start with the common law, which in this instance means *Percival* v. *Wright* [19]—a case that has had a remarkable career for a lower court decision— to the effect that a director has no fiduciary obligation of affirmative disclosure when he deals with shareholders individually rather than with his company. Although one might call this elevation of the corporate ghost (the *persona ficta*) over the flesh-and-blood owners of the company a monument to the ability of lawyers to hypnotise themselves with their own creations, and although a number of American courts have either abandoned the *Percival* concept [20] or achieved much the same result by paying lip service to it but finding " special circumstances," [21] *Percival* is still commonly (if erroneously) said to represent the " majority rule " in the United Sates at common law.

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[17] *Smolowe* v. *Delendo Corp.*, 136 F. 2d 231, 241 (2d Cir. 1943), cert. denied, 320 U.S. 751; see also *Blau* v. *Rayette-Faberge Inc.*, 389 F. 2d 469, 472 (2d Cir. 1968).

[18] The arrangement of digits and letters indicates simply that this is the fifth rule adopted by the SEC under section 10 (b) of the Securities Exchange Act of 1934. In the early cases and literature the rule appears as "X-10B-5," which was its original rendering before the SEC changed the style of all its rules to conform to the Code of Federal Regulations.

[19] [1902] 2 Ch. 421.

The common law development, however, as so often happens, has been aborted by the legislation. The very first of the SEC statutes. the Securities Act of 1933, contains a broad provision, section 17 (a), that outlaws fraud and material misstatements or half-truths in the *sale* of securities. The statutory sanctions are criminal prosecution, action by the SEC for injunction against threatened or continued violation, and, if the violator is a broker or dealer, disciplinary action in an administrative proceeding by the SEC under the 1934 statute. In addition, section 12 (2) of the 1933 statute creates a private action for rescission or damages in favour of the buyer against his misrepresenting seller.

The emphasis in the 1933 statute is on deceptive *selling*, because that is a statute primarily concerned with the process of distribution. In a sense, section 17 (a), which extends to *all* sales whether or not effected in the course of a distribution that requires a registration statement and prospectus, anticipated the 1934 statute, which has to do with trading in securities after their distribution. The 1934 statute, accordingly, contains a provision, section 15 (c) (1), that broadly outlaws fraudulent practices in connection with the sale *or purchase* of securities. But that provision is limited to brokers or dealers in the over-the-counter market, which is to say, off the floor of a stock exchange. The combination of section 17 (a) and section 15 (c) (1) thus left a hole to the extent of fraudulent purchases by persons other than brokers or dealers in the over-the-counter market—a hole quite large enough to include corporate insiders buying on undisclosed information of a " bullish " nature.

In late 1941 the SEC and representatives of the securities industry jointly proposed to Congress, as part of a broad legislative programme, that this hole be plugged by simply adding the words " or purchase " to section 17 (a). When that programme turned out to be a casualty of Pearl Harbour, the Commission in the spring of 1942 hit upon a simple solution that gave it the substance of the proposed amendment to section 17 (a) without the necessity of legislation. The answer was found in still another provision, section 10 (b), which makes it unlawful in magisterial terms for *any* person to " use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." The breadth of this section as well as its juxtaposition in the statute—following, as it does, a number of provisions in sections 9 and 10 (a) designed to curb or regulate such practices as market manipulation, trading in options, short selling and "stop loss orders"—clearly earmarks it as an omnibus mechanism. It was aptly described in the few short sentences that the Administration's spokesman devoted to it in the legislative hearings: "Subsection [b] says, 'Thou shalt not devise any other cunning devices.'"[22] The Commission simply breathed life into the non-self-operative provision by adopting a rule that in substance repeated the general antifraud language of section 17 (a) except that "in the sale" became "in connection with the purchase or sale."

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[20] See, *e.g.*, *Oliver* v. *Oliver*, 118 Ga. 362, 45 S.E. 232 (1903); *Stewart* v. *Harris*, 69 Kan. 498, 77 Pac. 277 (1904).

[21] *Strong* v. *Repide*, 213 U.S. 419, 431 (1909).

The Commission thus achieved its goal, which was simply to be able to investigate and apply the several public sanctions attendant upon statutory violations. Soon, however, the United States District Court in Philadelphia (one of the courts of first instance in the federal system), encouraged by the SEC as *amicus curiae*, held that a violation of the rule created a private right of action as a matter of federal law. This result was posited both on section 29 (b) of the 1934 statute, a restitution-sounding provision to the effect that any contract made in violation of any provision of the Act or any rule thereunder shall be "void" as regards the rights of the violating party, and on the common law doctrine that makes crimes out of certain torts.[23] Interestingly enough, this first private action under the rule was in a sense as extreme a test as one could imagine, bearing in mind that the rule was promulgated pursuant to a statute designed to regulate the stock exchanges and trading in securities. For the company in question had four shareholders altogether, all of them officers and directors, who held the shares in equal portions; and the plaintiffs charged a conspiracy between the defendants and another company to which the defendants had sold the bulk of the first company's assets pursuant to an agreement made before their purchase of the plaintiff's shares.[24]

Thus far the Supreme Court has addressed itself to the implication of private rights of action under the SEC statutes only in the context of the Commission's proxy rules, not Rule 10b-5. In a case that came up on the pleadings, the Court agreed unanimously that a merger that had been consummated on the basis of proxies solicited by means of false "proxy statements" could be set aside, if the trial court thought such drastic action was appropriate on a balancing of the equities as a matter of federal law, without regard to what the statutory or common law of the state of incorporation might have to say with respect to the unscrambling of corporate mergers.[25]

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[22] *Stock Exchange Regulation*, Hearing before House Com. on Int. & For. Commerce on H.R. 7852 and H.R. 8720, 73d Cong., 2d Sess. (1934) 115.

[23] Am.L.Inst., *Restatement of Torts* (1934), §286.

[24] *Kardon* v. *National Gypsum Co.*, 69 F.Supp. 512 (E.D.Pa. 1946), on the merits, 73 F. Supp. 798 (E.D.Pa. 1947).

The court, were it so inclined, could readily distinguish the proxy precedent in the context of Rule 10b-5, if only because there was no state law to displace in the field of proxy solicitation whereas recognition of a private right of action under Rule 10b-5, particularly as the jurisprudence in that context has developed in the lower federal courts, would federalise a great deal of state law in the area of fraud, management-shareholder relations and shareholders' derivative actions. On the other hand—even apart from the difficulty of ignoring the voidability provision in section 29 (b)—it seems considerably more likely that the Supreme Court will here follow the lower courts. The existence of a private right of action under Rule 10b-5 has now been recognised, whether by way of direct holding or *obiter* or *sub silentio*, by ten of the eleven Courts of Appeals, all without a single dissent. And the court's language in the proxy case was extremely broad—perhaps unduly so—in rationalising the implication of a private cause of action not *ex delicto* but on the ground basically that " Private enforcement of the proxy rules provides a necessary supplement to Commission action." [26]

If the Supreme Court does ultimately treat Rule 10b-5 as it has the proxy rules, it will place its stamp of approval on two highly significant phenomena that have been brought about by the lower federal courts:

The first is the flowering of what might be called the crime-tort doctrine, notwithstanding its considerable qualification in the country that gave it birth.[27]

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[25] *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), discussed in 5 Loss, *op. cit. supra*, note 1, at pp. 2879–2888.

[26] *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964).

[27] On the withering of the doctrine in England except with respect to industrial welfare legislation, see Williams, " The Effect of Penal Legislation in the Law of Tort " (1960) 23 M.L.R. 233. The author has elsewhere paid his respects to Lord Campbell's judgment in *Couch* v. *Steel* (1854) 3 E. & B. 402, and to the suggestion that that case dealt with a duty already owed by the master to his passengers and crew as a matter of admiralty law apart from statute. See 2 Loss, *op. cit.*, *supra*, note 1, at pp. 934–935; 5 *ibid.* at pp. 2883–2886.

Whatever the correct reading of that case, the doctrine would, of course, enjoy a vigorous rebirth under the two Law Commissions' proposal of a private right of action in the absence of contrary provision. *The Interpretation of Statutes*, Law Com. No. 21, Scot. Law Com. No. 11 (1969) paras. 38, 78.

Actually the American Law Institute in the *Restatement of Torts Second* (1965) diluted the statement of the principle in s. 286 of the original *Restatement* (1938) from " The violation of a legislative enactment by doing a prohibited act . . . *makes the actor liable* for an invasion of certain interests " to " The court *may adopt* as the standard of conduct of a reasonable man the requirements of a legislative enactment . . . whose purpose is found to be exclusively or in part " the protection of certain interests. But the draftsmen of the *Restatement Second* apparently reflected the state decisional law in the more orthodox tort contexts, overlooking the very considerable federal development of the doctrine under the SEC statutes.

The second, and vastly significant, phenomenon that has been developing in the outpouring of 10b-5 cases is what a number of judges and commentators have come to refer to as a "federal corporation law."[28] The situation here is more than a little reminiscent of the British professor of constitutional law who is said to have started his lecture by stating, "There is no British Constitution," and immediately to have added, "The British Constitution is the greatest constitution there ever was."

Corporations are, of course, incorporated by the several states—only banks have their choice of federal or state charters—and the basic corporation law, whether statutory or judge-made, is a variegated state law. Moreover, even the federal courts, when their jurisdiction is based on the parties' diversity of citizenship rather than a question of federal law, have been required since the great case of *Erie Railroad* v. *Tomkins* in 1938 to apply whatever law (including the conflict of laws) would be applied by a state court sitting in the particular state.[29] Before *Erie* the federal courts did not consider themselves bound to follow the appropriate state court's version of the common law, so that, on the one hand, there *was* at least a vision of a national common law that was applied in the federal courts, particularly in commercial cases, and, on the other hand, state and federal courts sitting on opposite sides of the street might reach different results in the same case. In this sense it is commonly said that *Erie* destroyed any possibility of a federal common law.

Nevertheless, the point that the SEC statutes are developing a federal corporation law has been made by Judge Friendly,[30] with his usual perception, in a lecture whose very title is a reprimand to those who still hold the simplistic view premised on *Erie*—a lecture he called "In Praise of Erie—and of the New Federal Common Law."[31] The basic corporation law is still state law. But federal legislation "is generally interstitial in its nature, [building] upon legal relationships established by the states."[32] Consequently every federal statute is surrounded by a penumbra of "statutory" common law (if one dare use the term), which is federal and uniform.

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[28] See, *e.g.*, *McClure* v. *Borne Chemical Co. Inc.*, 292 F. 2d 824, 834 (3d Cir. 1961), cert. denied, 368 U.S. 939; *Ruckle* v. *Roto American Corp.*, 339 F. 2d 24, 28 (2d Cir. 1964); *Cady, Roberts & Co.*, 40 SEC 907, 910 (1961); see also, *e.g.*, 1 Loss, *op. cit.*, *supra*, note 1, at pp. vii–viii; Cary, book review (1962) 75 Harv.L.Rev. 857, 858; Fleischer, "'Federal Corporation Law': An Assessment" (1965) 78 Harv.L.Rev. 1146.

[29] 304 U.S. 64. Whenever all the plaintiffs and all the defendants are citizens of different states and (with some exceptions) the amount in controversy is at least $10,000, the plaintiff always has his choice of suing in a federal court and, if the plaintiff chooses a state court, a defendant who is not a citizen of that state may remove the case to the federal court.

[30] Of the United States Court of Appeals for the Second Circuit, which sits in New York.

[31] (1964) 19 Record of N.C.B.A. 64, esp. at p. 88, reprinted with minor changes, (1964) 39 N.Y.U.L.Rev. 384, esp. at pp. 413–414.

[32] Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 435.

> "Were we bereft of the common law, our federal system would be impotent. This follows from the recognised futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself" [33]

That is to say, the courts, when they interpret the panoramic Rule 10b-5, are engaged conceptually in nothing more than the construction of a regulation adopted pursuant to statute. But, when they have to decide what "fraud" means in that context, and whether there is a private cause of action at all, and if so to what extent in terms of such common law deceit concepts as reliance and causation, and whether in statutory context corporate insiders may have an affirmative obligation to disclose material facts that they do not necessarily have at common law, the process in any realistic sense is judicial law-making in the common law tradition. This is the "new federal common law" of which Judge Friendly spoke. Indeed, one sometimes hears the phrase, "reverse *Erie*": whereas *Erie* requires the federal courts (including the Supreme Court of the United States) to follow state law as laid down by the state courts in cases that are not based on a federal question, the Supremacy Clause of the Constitution requires the *state* courts to follow *federal* law as laid down by the federal courts in so far as the cases before them turn on federal law.[34]

When we come to examine the content of this new federal common law that has been developed by the lower federal courts under Rule 10b-5, we find that they have enthusiastically abandoned *Percival* v. *Wright* in favour of an affirmative obligation on the part of directors and other insiders to disclose material facts in buying shares of their company. Neither Rule 10b-5 nor section 10 (b) of the statute refers in any way to insiders. Indeed, even a total stranger in an arm's-length transaction violates the rule if he affirmatively misstates a material fact or (what amounts to the same thing) indulges in a half-truth whose omitted half creates a materially false impression. But, by simply construing the fraud language of the rule as equating an insider's silence with an outsider's falsity, the courts have merrily and altogether wholesomely, if perhaps unwittingly, developed Rule 10b-5 into the major governor of insider trading.

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[33] *D'Oench Duhme & Co. Inc.* v. *Federal Deposit Ins. Corp.*, 315 U.S. 447, 471 (1942).

[34] Congress has in fact given the state and federal courts concurrent jurisdiction under all six of the SEC statutes *except* the Securities Exchange Act of 1934. See 3 Loss, *op. cit.*, *supra*, note 1, at pp. 2006–2007. And it is now quite clear that, when Congress expressly clothes the state courts with jurisdiction, appropriate state courts may not decline to exercise it. *Testa* v. *Katt*, 330 U.S. 386 (1947), 60 Harv.L.Rev. 966. Federal law may also figure in state litigation by way of defence—as, for example, when an ordinary action for breach of contract is met with a defence of illegality under the federal anti-trust laws; the state court must entertain the defence even though the particular federal question would be within the exclusive jurisdiction of the federal courts if raised offensively by way of an action for violation of the antitrust laws. *Bement* v. *National Harrow Co.*, 186 U.S. 70, 87–88 (1902); see 2 Loss, *op. cit.*, *supra*, note 1, at pp. 977–986; 5 *ibid.* at pp. 2951–2958. In either event, although the Supreme Court of the United States has no jurisdiction to review a decision of a state court of last resort unless a federal question is involved, it has ultimate appellate jurisdiction to the extent that a state court does decide a question of federal law (or when a state court erroneously *fails* to apply federal law).

To say this much, one need hardly add, is to begin the discourse, not to end it. Once an insider is considered to have substantially a fiduciary's affirmative disclosure obligation when dealing with outsiders, a considerable bevy of problems emerges, most of which have already been the subject of litigation. It is easier to put these problems than to answer them. In so far as answers are possible—and much of the discussion must still be speculative—the author has expressed himself elsewhere.[35] Here, space limitations fortunately intervening, it must suffice merely to enumerate some of the principal questions:

Who, besides a director or officer, is to be considered an insider? Surely his wife. But what about his brother-in-law? *E converso*, what of the separated wife? Is a controlling person who is careful not to make himself an officer or director to be considered an insider? Presumably yes. But what constitutes control for this purpose?[36] And suppose an insider gives a tip to a friend. One would think a person who knows he is a "tippee" takes the confidential information *cum onere*. But there are all kinds of "tippees." What about the legitimate financial analyst, employed by a brokerage firm or an institutional investor, who seeks information during a visit to the plant? Or the executive in a company's competitor who obtains inside information with respect to the first company in the course of negotiating a prospective merger, which may or may not eventuate? Are a large brokerage firm's employees on notice of inside information that its underwriting department has obtained in the course of negotiating a proposed distribution? Is a bank's trust department on notice of inside information that has been obtained by its mortgage department? And what of "tippees' tippees"? One could go on.

If insiders must disclose material facts in purchasing *shares*, do they have a similar duty in purchasing *debentures*? The director-creditor relationship is, after all, different from that of director and shareholder. Yet how much functional distinction is there between a non-voting preferred share and a debenture that pays interest only if earned—indeed, between a common share and an ordinary debenture of a publicly held company? Many, perhaps most, investors consider both to be different species of "investments." And, whereas section 16, the insider trading provision, speaks of any "equity security," Rule 10b-5 speaks generically of any "security," a term that is broadly defined by the statute to include everything from a common share to a first mortgage debt instrument.

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[35] See 3 Loss, *op. cit.*, *supra*, note 1, Chap. 9C; 3 *ibid.* at pp. 1757–1797; 6 *ibid.* at pp. 3556–3647, 3864–3925.

[36] On "control" concepts generally under the SEC statutes, see 2 *ibid.*, Chap. 5.

On a somewhat similar level, it is rather facile to impose an affirmative disclosure obligation on an insider who *sells*, since in that context he is not dealing by hypothesis with a person who is already a shareholder. Yet the rule does not distinguish between purchases and sales. Nor, so far, have the courts.

What about transactions effected through the impersonal mechanism of a stock exchange or in the highly organised over-the-counter market that exists in the United States? It is not quite so easy to imply a representation of fair dealing in that context as it is when director and shareholder are dealing face to face. Yet it would be a strange rule of fiduciary conduct that permitted the fiduciary to hide behind a mass of agents for unnamed principals—which is essentially what a stock exchange is.

On the assumption that an affirmative disclosure obligation exists, what must be disclosed? What is a " material " fact? How does one reconcile the duty of silence that the insider frequently owes his company with the duty of disclosure that he owes the public? And *when* is disclosure effectively made—when a press conference is held, or only after the news has appeared in the press, at some indefinite point of time later, after the public has had an opportunity to evaluate the unveiled nugget?

On the level of remedy rather than substance, to what extent does the plaintiff have to allege and prove *scienter*, reliance and causation? The rule is silent, naturally enough, since the whole idea of a private cause of action is implied, not express. But, at least to the extent that the theory of a private cause of action is *ex delicto*, can these basic elements of the common law of deceit be altogether ignored? Granted, they are to be given a federal meaning in so far as they are relevant, and one that serves the statutory purpose, without regard to the common law of deceit. But, if a private cause of action is to be implied, is it not logical enough to imply along with it some of the mitigating concepts that the law of torts has developed in fairness to defendants?

However difficult these questions may be, they are all directed to the relatively orthodox context of public shareholder versus insider. But the frontiers of the jurisprudence under the rule have been pushed considerably beyond that familiar model.

Although at first there was some indication that at least a " semblance of privity " between seller and buyer was necessary in order to state a cause of action under the rule,[37] by now private actions have been recognised by the appellate courts not only (on an aider and abettor or conspiracy theory) against persons who assist in the sale or purchase,[38] but also by market sellers or buyers against persons who have misstated a material fact without themselves having bought or sold.[39] It follows, as the Second Circuit put it in the celebrated *Texas Gulf Sulphur* case, that those responsible for a false or misleading press release may be liable to market buyers or sellers

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[37] *Joseph* v. *Farnsworth Radio & Television Corp.*, 99 F. Supp. 701, 706 (S.D.N.Y. 1951), affirmed *per curiam*, 198 F. 2d 883 (2d Cir. 1952).

> " whenever assertions are made . . . in a manner reasonably calculated to influence the investing public, *e.g.*, by means of the financial media . . . , if such assertions are false or misleading or are so incomplete as to mislead irrespective of whether the issuance of the release was motivated by corporate officials for ulterior purposes,"

unless corporate management " demonstrates that it was diligent in ascertaining that the information it published was the whole truth and that such diligently obtained information was disseminated in good faith." [40]

It cannot follow, however, that the absence of privity is entirely without relevance. As Judge Friendly cautioned in his concurring opinion in *Texas Gulf Sulphur*[41]:

> " If the only choices open to a corporation are either to remain silent and let false rumours do their work, or to make a communication, not legally required, at the risk that a slip of the pen or failure properly to amass or weigh the facts—all judged in the bright gleam of hindsight—will lead to large judgments,

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[38] *e.g.*, *Errion* v. *Connell*, 236 F. 2d 447 (9th Cir. 1956); *Texas Continental Life Ins. Co.* v. *Dunne*, 307 F. 2d 242, 249 (6th Cir. 1962). In *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (N.D.Ind. 1966), on the merits, 286 F. Supp. 702 (N.D.Ind. 1968), affirmed, 417 F. 2d 147 (6th Cir. 1969), a class action on behalf of all persons who had bought the insurance company's stock from a securities firm that had used the proceeds of the sales in its own speculations and subsequently gone bankrupt, the plaintiff prevailed on the theory that the insurance company's failure to report the securities firm to the Indiana Securities Commission or the SEC after receiving a number of complaints of non-delivery from buyers, a failure combined with certain affirmative acts, amounted to a tacit agreement with the firm to prevent complaints from reaching the authorities, thus facilitating the fraud and encouraging an artificial build-up in the market for the stock so that the company would be in a more favourable position for a potential merger it was then negotiating. In short, although the appellate court carefully avoided deciding whether the failure to report the firm's activities would itself give rise to liability under Rule 10b-5, it may be possible in certain circumstances to aid and abet a violation of the rule through silence and inaction. *Cf.* also *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 410 F. 2d 135, 144 (7th Cir. 1969).

[39] *Heit* v. *Weitzen*, 402 F. 2d 909, 913 (2d Cir 1968).

[40] *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 861–863 (2d Cir. 1968), cert. denied *sub nom.* *Coates* v. *SEC*, 394 U.S. 976. All that has actually been decided so far with respect to press releases is that a false release may violate the rule so as to entitle the SEC to injunctive relief. See also *SEC* v. *Great American Industries Inc.*, 407 F. 2d 453, 458–459 (2d Cir. 1968). The court in *Texas Gulf Sulphur* remanded the case to the trial court for a determination of the Commission's prayer for "restitution" to the victims (that is to say, those who had sold their shares) by way of relief ancillary to the prayer for injunction.

[41] 401 F. 2d at p. 867.

> payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers, most corporations would opt for the former."

The courts can no more ignore this policy limitation in imposing liability under Rule 10b-5 than they can in common law deceit, where, if privity is not essential, it is not irrelevant either. But it is too early to say where the line will be drawn under Rule 10b-5, particularly since most of the precedents are interlocutory decisions on defendants' motions for dismissal of the complaint or for summary judgment.

Again, the courts have held that a company's issuance of its own shares involves a "sale" and "purchase" for purposes of Rule 10b-5.[42] Since the company (or a shareholder suing derivatively) thus has a good cause of action against any director or other insider who has "purchased" securities from it by means of misstatement or omissions to state material facts, Rule 10b-5 has inevitably begun to play a substantial role in cases of corporate mismanagement. This is not to say that an ordinary mismanagement action can be transformed into a federal case under Rule 10b-5 "by the expedient of conclusory allegations, where one would not otherwise exist." [43] But the fact that section 10 (b) was not directed at "fraudulent mismanagement of corporate affairs" [44] does not foreclose the operation of the rule merely because the sale or purchase transaction "was part of a larger scheme of corporate mismanagement." [45]

The problem is to determine how close the connection must be between a security transaction and the mismanagement of which it is a part in order to avoid tail-wag-dog. And the difficulty of drawing the line is neatly demonstrated by a pair of troublesome derivative suits in which the Second Circuit within the space of a few weeks reached opposite conclusions.

In *Ruckle* v. *Roto American Corporation* the plaintiff, a director representing more than half of the voting shares, sued six of his fellow directors, who were also the president, four vice-presidents and the treasurer, alleging that they had sought to perpetuate their control by, *inter alia*, having the board approve the issuance of some 75,000 shares that were to be resold to the president or voted as he directed. The plaintiff alleged further that the defendants had withheld the latest financial statements from the board, had arbitrarily ascribed a value of $3 to the stock, and had approved several transactions involving the stock without disclosing the pertinent facts to the entire board. In reversing an order of dismissal, the court held that it was possible under Rule 10b-5 for a corporation to be defrauded by a majority of its directors " or even the entire board." [46]

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[42] *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 200–203 (5th Cir. 1960), cert. denied, 365 U.S. 814; *Ruckle* v. *Roto American Corp.*, 339 F. 2d 24, 27–28 (2d Cir. 1964); *Schoenbaum* v. *Firstbrook*, 405 F. 2d 215, 219 (2d Cir. 1968), cert. denied *sub nom. Manley* v. *Schoenbaum*, 395 U.S. 906; *Condon* v. *Richardson*, 411 F. 2d 489, 491 (7th Cir. 1969).

[43] *Lester* v. *Preco Industries Inc.*, 282 F.Supp. 459, 462 (S.D.N.Y. 1965).

[44] *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461, 464 (2d Cir. 1952).

[45] *New Park Mining Co.* v. *Cranmer*, 225 F.Supp. 261, 266 (S.D.N.Y. 1963).

The *Ruckle* opinion was by Judge Medina, joined by Judge Lumbard, with Judge Marshall (now Mr. Justice Marshall of the Supreme Court) concurring in the result. A few weeks later, in *O'Neill* v. *Maytag*, Judge Marshall joined in an opinion by Judge Lumbard that distinguished *Ruckle*, Judge Hays dissenting without opinion. O'Neill brought an action on behalf of National Airlines Inc., against all its directors and Pan American World Airways Inc., alleging an exchange of shares between the two companies at an unfavourable ratio that had cost National $1.8 million on the basis of market prices. The Civil Aeronautics Board had ordered the companies to eliminate the cross-ownership of their shares by either selling or re-exchanging them. But it was the theory of the complaint that the defendant directors had caused National to pay a premium in order to get rid of a large block of Pan American stock that had threatened their control. The SEC, which had not appeared in *Ruckle*, came into *O'Neill* as *amicus curiae* to support the plaintiff. But the majority held that Rule 10b-5 required more than a breach of one of the general fiduciary duties owed by directors to their corporation when the breach did not involve deception. The majority conceded that there might be difficulties in drawing the line between misrepresentation in securities transactions and fraudulent mismanagement when the transactions were part of an internal control struggle. And *Ruckle* was distinguished because of the allegation there that a majority of the directors had secured the board's approval of the issuance of shares at an arbitrary value by withholding the most recent financial statements of the company. There being a clear allegation of deception in connection with the purchase of securities, the fact that it had occurred within the corporate structure did not avoid liability under Rule 10b-5. But " there must be allegation of facts amounting to deception in one form or another; conclusory allegations of deception or fraud will not suffice." [47]

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[46] 339 F. 2d 24, 29 (2d Cir. 1964).

[47] 339 F. 2d 764, 768 (2d Cir. 1964). The fact that *all* the directors were defendants appears in Brief for Defendants-Appellees, p. 2. The 10b-5 plaintiff may always add a count that pleads alternatively at common law—as he usually does and did in *O'Neill*—if the federal court has either " diversity jurisdiction " (which requires that none of the plaintiffs be a citizen of the same state as any of the defendants) or " pendent jurisdiction " (which requires that the federal count not be frivolously pleaded and that the two counts reflect essentially " one constitutional ' case ' "). On pendent jurisdiction, which is still evolving, see 2 Loss, *op. cit.*, *supra*, note 1, at pp. 1006–1118; 5 *ibid.* at pp. 2960–2975; the quotation is from *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966). But under *Erie* this would gain the plaintiff nothing in comparison with a state court action except for certain *procedural* advantages (which may be important) in the federal judicial system. And liability for insider trading at common law is, of course, another story.

There are a number of possible explanations of *O'Neill*, but none entirely satisfies. Perhaps the most realistic analysis is that more or less as in the section 16 (b) area, where the Second Circuit's pendulum began to swing back after the court had accumulated sufficient experience to appreciate the need for greater discrimination, a similar process is now taking place with reference to Rule 10b-5. In Lord Devlin's trenchant prose[48]:

> "It is not in accordance with traditional methods of judicial law-making to begin by saying how far you will go. Some cases are allowed and then others are disallowed as going too far, and the formulation of principle has to wait until that process is well advanced; and during the process the common lawyer will stop, logic or no logic, when something tells him that he has gone far enough."

Altogether the Second Circuit was recently led to observe that "the laws governing the securities market become more intricate and finely spun daily. Some engaged in the business of securities trading believe themselves to be characters from Victorian novels wandering aimlessly on treacherous moors."[49] Nevertheless, it is not the writer's purpose to paint a chamber of horrors. Reversal of *Percival* v. *Wright* is overdue, as the Jenkins Committee and a number of Canadian legislatures have agreed.[50] It may be possible and desirable, in a jurisdiction that has yet to overrule *Percival*, to anticipate some of the consequential problems by legislation. And there is now a rich reservoir of case law and commentary available in the United States.[51] But the ultimate point is that the host of problems attendant upon the recognition of something like a fiduciary duty on the part of directors and other insiders when dealing with shareholders cannot be swept under the rug. One way or another they must be met and solved.

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[48] *Samples of Law Making* (1962), p. 10.

[49] *H. Kook & Co. Inc.* v. *Scheinman, Hochstin & Trotta Inc.*, 414 F. 2d 93, 98 (2d Cir. 1969).

[50] Cmnd. 1749 (1962), paras. 86–89, 99 (b). Under the Canadian statutes, any director, senior officer or 10 per cent. beneficial holder (as well as any "associate or affiliate" of any such person) who in connection with a transaction relating to his company's securities "makes use of any specific confidential information for his own benefit or advantage that, if generally known, might reasonably be expected to affect materially the value of such securities" is "liable to compensate any person or company for any direct loss suffered . . . as a result of such transaction, unless such information was known or ought reasonably to have been known to such person or company at the time of such transaction." Alta., 16 Eliz. 2, c. 76, §113 (1967); B.C., 15 & 16 Eliz. 2, c. 45, §111 (1967); Man., 17 Eliz. 2, c. 57, §113 (1968); Ont., 14 & 15 Eliz. 2, c. 142, §113 (1966); Sask., 16 Eliz. 2, c. 81, §120 (1967).

[51] The American Law Institute has recently announced that it will undertake to re-examine all the SEC statutes and to integrate them into a Federal Securities Code. The author has been appointed Reporter and, happily, Professor Gower has agreed to serve as one of the Consultants. The author has elsewhere written in this connection that the time is probably not ripe to foreclose judicial invention of private rights of action under the SEC statutes by making everything express, since the courts may well be better able in the next decade or so to prick out a series of lines in the "new federal common law" tradition, but that a crying need does exist in this area for rationalisation in a number of respects so that the courts may continue to build on a higher and somewhat more regular plateau. Loss, "The American Law Institute's Federal Securities Code Project" (1969) 25 Bus. Law., 27, 34–35. The new California Corporate Securities Law of 1968 tries to do this to some extent. Cal.Corp. Code §§25402, 25502.

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RECENT DEVELOPMENTS IN THE INTERNATIONAL COURT OF JUSTICE

THE SOUTH-WEST AFRICA CASES

IT is proposed in this article to summarise briefly recent developments concerning the International Court of Justice. The Court is still suffering to some extent from the storm aroused by its judgment in the second phase of the *South-West Africa Cases*,[1] in which " the Court, by the President's casting vote—the votes being equally divided [2]—decides to reject the claims of the Empire of Ethiopia and the Republic of Liberia." These claims related to the alleged maladministration by South Africa of South-West Africa for which it had been granted a Mandate under article 22 of the Covenant of the League of Nations on December 17, 1920. The Court had found on December 21, 1962 [3] by eight votes to seven that " it has jurisdiction to adjudicate upon the merits of the dispute." The judgment given in the second phase was not a formal reversal of that given in the first because the Court did not declare itself to be without jurisdiction, but instead it rejected the claims of the applicants on the ground that those States could not be " considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims." The second judgment has therefore not unreasonably been called an " effective reversal " of the first. Some commentators simply find it hard to credit that " the principal judicial organ of the United Nations " [4] should miss an opportunity to condemn South Africa, but responsible criticism has centred around the following points: (i) that, if it really was the case that the applicants had no legal right or interest in the subject-matter of their claims, it should not have taken six years of extremely expensive and elaborate proceedings before that fact could be determined; (ii) that in 1962 the Court had rejected a South African objection to jurisdiction based on the argument that the applicants had no interests involved in the dispute; and (iii) that the question of the interest of the applicants was scarcely discussed by the parties in the second phase.

These cases have already stirred up a vast literature. For many years to come international lawyers will find in the official volumes of *Pleadings, Oral Arguments, Documents* that have emerged from them a veritable storehouse of material on the history of the mandates, human rights, apartheid and many other issues. Those who wish for more rapid enlightenment may usefully consult a small volume issued by the International Commission of Jurists.[5] Although the view was widely expressed at the time that all confidence in the Court would be lost, this has fortunately proved to be a false forecast. Time itself heals. Also, the system, provided for in article 13 (1) of the statute, under which five of the fifteen judges retire every three years, leads to a fairly rapid turnover in the membership. Five new judges came onto the Bench in 1967; five more judges are due to retire in 1970, although re-election is possible. As regards South-West Africa itself, efforts have shifted away from an attempt to achieve a solution by judicial means to political action. In its resolution 2145 (XXI) the General Assembly purported to terminate the Mandate altogether. Later a United Nations Council for South-West Africa, now known as Namibia, was set up, and as recently as March 20, 1969 the Security Council declared that "the continued presence of South Africa in Namibia is illegal."

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[1] *I.C.J. Reports* 1966, p. 6.

[2] Seven votes to seven.

[3] *I.C.J. Reports 1962*, p. 319.

[4] Statute of the International Court of Justice, art. 1.

THE NORTH SEA CONTINENTAL SHELF CASES

To return to the Court, it is fortunate that its next two cases, although potentially very important, were less politically charged. Known as the *North Sea Continental Shelf* cases,[6] they concerned disputes between the Federal Republic of Germany and Denmark on the one hand and between the Federal Republic of Germany and the Netherlands on the other hand[7] concerning the division of the continental shelf in the North Sea. The discovery of large quantities of natural gas, and also of some oil, under the bed of the North Sea has made this a relatively urgent problem. Although it would have been better if all the North Sea countries had settled the problem through a single multilateral treaty, this has not in fact happened. Instead there have been a series of bilateral agreements and the trouble which led to this case was that, although the Federal Republic reached an agreement with the Netherlands in 1964 and with Denmark in 1965, these were only partial agreements. Talks to complete these agreements proved abortive and the matter was brought to a head by Denmark and the Netherlands making an agreement in 1966 which the Federal Republic considered to be prejudicial to its interests.

The difficulty may be simply explained. Denmark and the

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[5] "South-West Africa: The Court's Judgment." Two studies published by the International Commission of Jurists (Geneva, 3.25 Sw.Fr. $0.75 U.S. 5s. 4d.) This publication consists of a "Staff Study," of the 1966 judgment and also of an updated version of the article by Dr. Rosalyn Higgins on "The International Court and South West Africa: The Implications of the Judgment," which originally appeared in *International Affairs*, October 1966.

[6] *I.C.J. Reports 1969*, p. 3. In these cases too the volumes of *Pleadings, Oral Arguments, Documents* now emerging are of great interest.

[7] As with the separate actions of Ethiopia and Liberia over South-West Africa, the Court decided to join the two cases.

Netherlands wished to apply the principle of equidistance set out in article 6 of the Geneva Convention on the Continental Shelf 1958, as follows:

> " (1) Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
>
> (2) Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured."

This Convention entered into force on June 10, 1964. Denmark and the Netherlands, who are parties to it, urged that the Federal Republic was bound by these principles of delimitation even though she had only signed, but not ratified, the Convention.

As the Court stated [8]:

> " . . . in the case of a concave or recessing coast such as that of the Federal Republic on the North Sea, the effect of the use of the equidistance method is to pull the line of the boundary inwards in the direction of the concavity. Consequently, where two such lines are drawn at different points on a concave coast, they will, if the curvature is pronounced, inevitably meet at a relatively short distance from the coast, thus causing the continental shelf area they enclose, to take the form approximately of a triangle with its apex to seaward and, as it was put on behalf of the Federal Republic, ' cutting off ' the coastal State from the further areas of the continental shelf outside of and beyond this triangle."

In place of the principle of equidistance the Federal Republic boldly demanded " a just and equitable share " of the North Sea continental shelf roughly in proportion to the length of its coastline. It argued too that it was not bound to apply the principles of the Geneva Convention and that, even if it were, it was entitled to invoke the exception of " special circumstances." Its opponents contended that there were no " special circumstances " applicable and that, even though Germany was not formally a party to the Geneva Convention, the principles of delimitation enshrined therein either were inherent in the notion of the continental shelf as a submarine area over which coastal States were entitled to exercise sovereign rights for the purpose of exploring it and exploring its natural resources, or had since 1958 been incorporated into international customary law through State practice.

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[8] *I.C.J. Reports 1969*, 3, 17.

The result of the cases was not a clear-cut victory for either side. The Court rejected the Federal Republic's contention because it pointed out that its task was one relating "essentially to the delimitation and not the apportionment of the areas concerned," and "delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area."[9] Carrying this further the Court described as "the most fundamental of all the rules relating to the continental shelf" the rule "that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land."[10] From this concept of *natural prolongation* it followed that "whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State."[11] Put more simply, this means that in certain geographical circumstances—such as those which exist in the south-eastern part of the North Sea—an area of seabed can form part of the natural prolongation of the territory of one State even though it is in fact closer to the territory of another State.

So, although the Federal Republic did not establish its idea of the "just and equitable share" as such, it had the satisfaction of seeing the Court hold that the use of the equidistance method of delimitation was not obligatory and that

> "delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other."

Among factors to be taken into account in the negotiations were "the general configuration of the coasts of the Parties" and "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline. . . ."[12]

The reference to subsequent agreements and negotiations is to be explained as follows. The dispute was referred to the Court by agreement of all three States. In the agreement the Court was requested to decide the following question:

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[9] *Ibid.* at p. 22

[10] *Ibid.*

[11] *Ibid.* at p. 31.

[12] *Ibid.* at pp. 53–54.

> " What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary already determined? "

The agreement provided for subsequent negotiations between the Parties " in pursuance of the decision requested from the International Court of Justice." The effect of the judgment is therefore to strengthen the position of the Federal Republic in the ensuing negotiations, and it will be surprising if an amicable agreement is not reached. The judgment was arrived at by eleven votes to six. The difference between the judges centred mainly around the familiar problem of the degree of proof required to establish a rule of international law. To a limited extent the same differences of outlook on this basic point as were manifest in the *South-West Africa* cases showed themselves again here. Critics may perhaps say that, by failing to confirm the Geneva Convention rule as a rule of customary law, the Court has dealt a blow at the codification process being undertaken by the United Nations. Still, even the most jaundiced critic would have to admit that technically the judgment is a very competent piece of work, being far better in this respect than that given in the other post-war case involving the delimitation of maritime boundaries.[13]

OTHER DEVELOPMENTS

1. *Jurisdiction of the Court*

According to the Court's *Yearbook 1968–1969*, the position as at July 31, 1969, was that 126 States were Members of the United Nations and therefore *ipso facto* parties to the Statute of the Court. In addition three States, not Members of the United Nations, were parties to the statute of the Court: Liechtenstein, San Marino, Switzerland. Further, in accordance with article 35 (2) of the statute, the Court was open to certain States not parties to the statute: the Federal Republic of Germany and the Republic of Viet-nam. However, only forty-five States had made declarations recognising as compulsory the jurisdiction of the Court under article 36 (2) of the statute. An analysis of these declarations, the reservations attached to them and the countries by whom they were made, would provide a fair indication of the state of international law at the present time. Space does not permit that task to be undertaken here, but it is perhaps worth emphasising that the argument that, whether through the *South-West Africa* cases or any other cause, the " Third World " has entirely lost confidence in the Court is much exaggerated. The list shows declarations made by, *inter alios*, Cambodia, Colombia, Dominican Republic, El Salvador, Gambia, Haiti, Honduras, India, Kenya, Liberia, Malawi, Malta, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Panama, Philippines, Somalia, Sudan, Swaziland, Uganda and Uruguay. There is also the important declaration made by the United Arab Republic on July 22, 1957, accepting the Court's jurisdiction *vis-à-vis* certain other States and over certain disputes concerning the Suez Canal.

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[13] *Anglo-Norwegian Fisheries case, I.C.J. Reports 1951*, p. 116.

In this connection it is important to draw attention to the revised declaration made by the Government of the United Kingdom on January 1, 1969.[14] This declaration to some extent widens and also to some extent restricts the jurisdiction previously granted to the Court. The reservation of " disputes with regard to questions which by international law fall exclusively within the jurisdiction of the United Kingdom " has been removed, as has the restriction on disputes with Commonwealth countries so long as these disputes are not with regard to situations or facts existing before January 1, 1969. This last change is to be seen in the context of the policy of treating relations with Commonwealth and non-Commonwealth countries alike, as exemplified by the recent establishment of the Foreign and Commonwealth Office. Also removed is the restriction on " disputes arising out of, or having reference to, any hostilities, war, state of war, or belligerent or military occupation in which the Government of the United Kingdom are or have been involved." It must be remembered that, whenever the United Kingdom drops a reservation to its acceptance of the Court's jurisdiction, it not only exposes itself to more jurisdiction as a defendant but also widens the options available to itself as a plaintiff since a defendant is always entitled to rely on the reservations in the plaintiff's acceptance as well as those in his own. For instance, if it were considered desirable to sue the United Arab Republic in respect of the British ships still detained in the Suez Canal, it might now become practicable to do so. But the United Kingdom has in another respect widened its restrictions on the Court's jurisdiction, thus reducing its opportunities as a plaintiff at the same time. This has been done by limiting the acceptance to " all disputes arising after October 24, 1945, with regard to situations or facts subsequent to the same date." The previous critical date was February 5, 1930, so fifteen years' worth of disputes have now been excluded at one stroke. It is impossible to be precise as to the practical significance of this exclusion. It may not be as great as it seems, since, in addition to the reservation (already alluded to) of disputes arising out of or having reference to hostilities, wars, etc., the previous declaration deposited in 1963 also excluded " disputes arising out of events occurring between September 3, 1939, and September 2, 1945." Disputes arising between 1930 and 1939 with regard to situations or facts subsequent to 1930 are now, however, for the first time excluded.

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[14] Cmnd. 3872.

2. The Court's *Yearbook 1967–1968* refers to an official visit to the Court made by the Secretary-General of the United Nations, during which the Secretary-General " assured the Court that he would always be mindful of the need which the United Nations has for an impartial tribunal which can contribute more than any other organ to the triumph of law and justice for the solution of international differences " and " made it clear that he wished to do all in his power to assist the Court in making its maximum contribution to the maintenance of peace." For its part " the Court suggested to the Secretary-General certain possibilities for enhancing its usefulness and for the full recognition of its status." It would be interesting to know what these suggestions consisted of. Some clue is given by the report that the Court " proposes to make its true role and its work better known and understood. It is also conscious of the usefulness of following more closely developments within international organizations and institutions and their work."

With this in mind a Committee on Relations consisting of Judges Sir Gerald Fitzmaurice, Sir Muhammad Zafrulla Khan, Ammoun and Lachs, was set up in April 1967. Its report was adopted on May 24, 1968, and the Committee thereupon became a standing committee of the Court. The report dealt with the relations of the Court with other international organs and bodies, including the specialised agencies and international conferences dealing more particularly with the codification of international law. All this may be seen as an attempt to heal the breach between the Court and the General Assembly which arose as a result of the *South-West Africa* cases. More generally, it seems that the Court sees more hope of " enhancing its usefulness " through increased participation in the work of international organisations than in any marked extension of its jurisdiction over disputes between States. Meanwhile, it is satisfactory to learn that another Committee of the Court, consisting of Judges Sir Gerald Fitzmaurice, Jessup, Gros, Ammoun and Lachs, has been revising the Rules of Court. This is obviously a task to be undertaken with deliberation when the Court is not burdened with too many cases.

3. *Seat of the Court*

The Court's *Yearbook 1968–1969* contains an announcement of a proposal to amend the Court's Statute. Under article 70 the Court has power to propose to the Secretary-General of the United Nations amendments to its own statute, but article 69 provides that the procedure for bringing these into effect is the same as that required for amending the Charter itself subject to any provision which may be adopted concerning the participation of States which are parties to the Statute but not Members of the United Nations. The practical effect of this is that the support of two-thirds of the members of the General Assembly and all the permanent members of the Security Council is required: in other words the veto applies.

What the Court proposes is to amend article 22 (1) which stipulates that " The seat of the Court shall be established at The Hague." The intention is to add the words " or at such other place as shall at any time be approved by the General Assembly on the recommendation of the Court." The Court points out that no other principal organ of the United Nations and none of the specialised agencies has its seat specifically designated in its constitutional instrument, and that it is desirable to ensure uniformity in this respect.

This reason hardly seems convincing, so it is necessary to look for others. The Court says that " it is an uncontroverted fact that the Peace Palace, while a noble monument with an historic past, is totally unsuited to the needs of the International Court of Justice." No evidence is, however, provided in support of this assertion. The reason why article 22 (1) was adopted in 1945 is, as the Court points out, that a similar provision had been included in the statute of the Court's predecessor, the Permanent Court of International Justice; that at that time it was desired to base the statute of the new Court as closely as possible upon that of the old one; and that in any case no particular attention was then paid to the question of the seat. If it be asked why the Permanent Court of International Justice was located in The Hague in the first place, the answer is to be found in the fact that the Peace Conferences of 1899 and 1907, to which the idea of an international court of justice can be traced back, were held there and that, as a result of those Conferences, the Permanent Court of Arbitration was established in The Hague. The actual building, the Peace Palace, at present houses both the Permanent Court of Arbitration and the International Court of Justice. As the latter body points out in the latest edition of its *Yearbook*, however,

> " Since the establishment of the Permanent Court of International Justice in 1922, the Permanent Court of Arbitration has been called upon to decide seven cases but there is no corporate relationship between the International Court of Justice and its Registry and the Bureau International de la Cour Permanente d'Arbitrage, which latter Court of course, has no permanent bench of judges.[15] No appreciable advantage accrues to either institution from the physical proximity of the other. On the other hand, the facilities of the Peace Palace in The Hague are inadequate for the requirements of the two institutions."

The Court also draws attention to the fact that " there have been under consideration since 1966 proposals by the Government of the Netherlands that a new building be erected for the International Court of Justice."

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[15] This is not entirely true. Art. 4 (1) of the statute of the International Court of Justice provides that " The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration . . . ."

On the information at present available it is impossible to tell what the Court really has in mind. The conditions in the Peace Palace are no doubt not ideal. On the other hand, bearing in mind that an international tribunal has worked under these conditions for nearly fifty years, it is difficult to believe that they have suddenly become intolerable. A possible explanation is that, since plans evidently exist for erecting a new building in The Hague, the Court is anxious to strengthen its bargaining position by intimating that it may not necessarily be bound to stay in that city. As against this, there are indications of a more serious change of mind on the part of the Court. The *Yearbook*, for instance, contains this sentence: " Since 1922, changes in world conditions have affected the relative significance, for the operations of the International Court of Justice, of The Hague and of other places. The special qualities attached to The Hague in 1922 are less distinctive now, and the importance of other places as legal centres has been enhanced." This could reflect a desire on the part of some of the judges to remove the Court from The Hague altogether, to New York perhaps, or to Geneva, or even to some city in the " Third World." It is not easy to understand which are the other possible " legal centres " that the Court has in mind. The Hague Conference on Private International Law is, as its very title suggests, based on The Hague and, under the terms of its Statute, its operation is in the hands of " The Netherlands Standing Government Committee, instituted by the Royal Decree of 20th February, 1897." The International Institute for the Unification of Private Law has its headquarters in Rome. Other possible " legal centres " are Luxembourg (European Court of Justice), Strasbourg (European Court of Human Rights) and Vienna, the venue of international legal conferences of great importance in 1961 (law of diplomatic relations), 1963 (law of consular relations) and 1968–69 (law of treaties). It will be noted, however, that (with the exception of New York) the centres just mentioned are all in Europe, whereas the sentence quoted above seems to indicate a desire to remove the Court from Europe altogether. What could more effectively symbolise, for instance, the substitution of a " new international law " for the system of European origin that at present exists than the eviction of the highest international tribunal from the homeland of Grotius? Symbols are not without importance, and this seemingly innocent proposal may conceal an intention to bring the administration of international justice down into the political arena. In that sense it could be a reaction to the Court's decision in the *South-West Africa* cases discussed above.

In this article it has not been possible to do more than draw attention to the significance of this proposal. Its implications deserve very careful consideration. Meanwhile, it is hoped that one factor will not be overlooked. At present the students who come from all over the world to attend courses at The Hague Academy of International Law are enabled sometimes to obtain first-hand experience of the working of the Court. This advantage would be lost if the Court were to move to a new location.

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THE SEPARATION ORDER: A STUDY IN TEXTBOOK LAW AND COURT PRACTICE

A MAGISTRATES' court in its matrimonial jurisdiction has power, *inter alia*, to provide that " the complainant be no longer bound to cohabit with the defendant." The non-cohabitation clause in a matrimonial order (alternatively known as a separation order), once the prime remedy available to ill-used wives, retains its pre-eminence only in the statutory priority accorded to the orders which the court can make by virtue of section 2 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960.[1] But the separation order is more than a historical relic. The Committee on Statutory Maintenance Limits in April 1968 reflected a widely-held view that " today the main concern of the magistrates' domestic court is to determine issues which will affect the wife's financial position, and only rarely now do justices make an order providing for the non-cohabitation of the spouses." [2] But the practice in magistrates' courts conflicts with this unexceptional statement of the law. Separation orders still figure prominently in the exercise of the justices' matrimonial jurisdiction—to what extent and for what reasons we shall endeavour to explain.

Magistrates are clearly given by the statute a discretion whether or not to include a non-cohabitation clause in any order they might make; and the discretion is absolute. As Sir Jocelyn Simon P. said in *Corton* v. *Corton*,[3] " I do not believe that it would be right to put any such clog on the discretion of the justices." But any discretion must be exercised judicially and therefore in accordance with the principles enunciated by the High Court in decisions over the last sixty years. Until the turn of the century magistrates included, as a matter of course, a non-cohabitation clause in every order for maintenance. Then in 1906 in *Dodd* v. *Dodd* [4] Sir Gorell Barnes P. condemned the widespread use of separation orders and declared that the intention of the Summary Jurisdiction (Married Women) Act 1895, consolidating and extending the 1878 and 1886 legislation, was to empower justices to make separation orders only in cases of cruelty and of habitual drunkenness where protection for the spouse could be presumed to be necessary. The Royal Commission on Marriage and Divorce in 1912 explained the automatic insertion by magistrates of non-cohabitation clauses on the basis that "it may be doubted whether the effect of its provisions [section 5 (a) of the 1895 Act] were adequately appreciated at the time it was passed." [5] The Commission went on to endorse the judicial view that separation orders should be made only where they were necessary for the reasonable immediate protection of the wife.[6]

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[1] Subs. (*a*) of s. 2 (1) provides for the granting of a separation order. Subs. (*b*) deals with maintenance for the wife, and (*c*) for the husband: subss. (*d*) to (*h*) provide for custody and access to and maintenance for, children.

[2] Cmnd. 3587, para. 28, p. 9. A similar view is to be found in the Law Commission's Working Paper No. 9 "Matrimonial and Related Proceedings—Financial Relief" April 25, 1967, p. 10: "But today such clauses [non-cohabitation clauses] are very rare and inserted only when it is clear that they are needed for a spouse's protection."

[3] [1965] P. 1.

[4] [1906] P. 189 approved by the Court of Appeal in *Harriman* v. *Harriman* [1909] P. 123.

The statistical information for the period 1903–1935, after which period the numbers of separation orders were not separately recorded in cases where a maintenance order was also made, tells its own tale. In 1903 the ratio of separation orders to maintenance orders was 93 per cent: this proportion fell from 89 per cent. in 1909 to 72 per cent. in 1910 and to 65 per cent. in 1913. The average for the period 1921–1925 was 58 per cent.; but this rose to 62 per cent. in 1926–1930 and to 61 per cent. in 1931–1935. These figures suggest a substantial misuse of the power to make a separation order as exemplified in a constant trickle of cases of improper use which have continued to come to the High Court.[7]

The judicial policy of restricting separation orders to the rare case where a wife requires the protection of such a legal sanction, reflected in these reported decisions, has never wavered. In *Corton* v. *Corton* the President of the Probate, Divorce and Admiralty Division compendiously defined the circumstances on which justices could properly insert a non-cohabitation clause:

> "The justices should specifically direct their minds to whether a separation is called for in the circumstances of the particular case. It should be the subject of a separate adjudication on their part.
>
> But in coming to their conclusions there are certain questions which I think that they would find it helpful to ask themselves. First, is a separation order really necessary for the protection of the complainant?. . . Secondly and closely associated, whether it is a more than ordinarily serious case . . . .
>
> Thirdly, and perhaps most important, the justices should consider whether a reconciliation is reasonably to be looked for." [8]

Faced with such explicit judicial directions, legal commentators have not unreasonably concluded that rarely would it be right for justices to make separation orders, since the need for wives to be physically protected from their husbands hardly arises; and to the extent that a wife may on occasions require protection she can always obtain an injunction from the courts ordering the husband not to molest his wife. If magistrates are then making separation orders for which there is no legal authority, are the complainants in receipt of these orders in any way jeopardised, or are the orders simply so much legal surplusage?

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[5] Cd. 6478, paras. 137 and 138 and Evidence, Vol. 1, pp. 343 and 459.

[6] *op. cit.*, p. 69, para. 145 and p. 162.

[7] *Robinson* v. *Robinson* [1919] P. 352; *Bottoms* v. *Bottoms* [1951] P. 424; *Haynes* v. *Haynes* [1952] P. 272; *Guinness* v. *Guinness* [1966] 1 W.L.R. 258; *Smith* v. *Smith* (1931) 47 T.L.R. 383; *Squires* v. *Squires* (1946) 62 T.L.R. 631; *Thomas* v. *Thomas* (1923) 129 L.T. 575; *Mackenzie* v. *Mackenzie* [1940] P. 81; *Cooper* v. *Cooper* [1940] P. 240; *Perks* v. *Perks* [1945] P. 1; *Cohen* v. *Cohen* [1947] P. 147; *Corton* v. *Corton* [1965] P. 1; *Jolliffe* v. *Jolliffe* [1965] P. 6; *Halden* v. *Halden* [1966] 1 W.L.R. 1481, 1483; *Wall* v. *Wall* [1968] 1 W.L.R. 306.

[8] [1965] P. 1, 3–4.

Section 2 (1) (*a*) of the 1960 Act empowers magistrates to make orders containing a provision "that the complainant be no longer bound to cohabit with the defendant (which provision while in force shall have effect in all respects as a decree of judicial separation)." It is perhaps not without significance that the parathesis in section 2 (1) (*a*) omits words which appeared in the 1895 Act equating the non-cohabitation clause with a decree of judicial separation "on the ground of cruelty." In *Harriman* v. *Harriman*[9] the Court of Appeal did not go quite as far as to say that the provision in the 1895 Act meant that a non-cohabitation clause could be inserted only on an application based upon a case of persistent cruelty. But in that case, where the complaint had been on the ground of desertion, the non-cohabitation clause was held to be valid although, the court said, only rarely would it be proper to make such an order in the case of desertion. The dropping of these words in the 1895 Act from the latest provision is unfortunate. It indicates that there is no statutory limitation upon the magisrates' discretion.

The separation order invariably recites that "the complainant be no longer bound to cohabit with the defendant." It therefore does not order a husband to leave his wife or to remain away from the matrimonial home,[10] but what it does do is to relieve both spouses from the legal obligation to live together, however unenforceable that obligation may be in practice. It also prevents a husband terminating his matrimonial offence of desertion by offering to cohabit with and maintain his wife. All this is theoretical. But what is not theoretical is that the existence of a separation order is a bar to a decree of divorce on the ground of desertion. By obtaining an order of separation a wife is expressing not only her desire that cohabitation with her husband should not be resumed, but also effectually preventing his return to her. The effect is to counteract the essence of desertion, which is one spouse leaving the other without reasonable excuse for a period of three years.

There is little doubt that in many instances the court in making a maintenance order inadvertently omits to strike out from the printed form, which is adaptable to different orders, the non-cohabitation clause. In *Mackenzie* v. *Mackenzie*[11] a wife who did not want protection and had not asked for it and had never relied on a non-cohabitation clause inserted at the time of her order for maintenance found herself debarred from petitioning for divorce on the ground of desertion. MacKinnon L.J. observed[12] that

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[9] [1909] P. 123, 133, 135, 141–142.

[10] *Montgomery* v. *Montgomery* [1965] P. 46, 51.

[11] [1940] P. 31: see also *Halden* v. *Halden* [1966] 1 W.L.R. 1481, 1483.

> "on January 12, 1934 there were no fewer than nine magistrates sitting at this Petty Sessional Court at Paignton, assisted, no doubt, by a clerk. I do not know whether they have become aware of the fact that owing to their stupid carelessness in putting this formal non-cohabitation clause into an order of the court for maintenance, they have occasioned injustice to this unfortunate petitioner. Unhappily, it is an injustice that we cannot remedy."

So long as the non-cohabitation clause has been inadvertently inserted (or rather not struck out of the printed form) it would be possible to apply to the magistrates to vary their order by striking out the non-cohabitation clause. The only question then would be whether the three years' desertion would have to run again from the date of the amended order or whether the amendment could operate retroactively.[13] Even then the husband might oppose any amendment on the basis that it might effect a change whereby he became a deserting spouse liable to divorce on that ground. Suffice it to say that, even if the inclusion of a separation order is curable by an amending order, there are complications which it would be best to avoid at the outset by not including a non-cohabitation clause.

Curiously, a separation order has one positive virtue for the wife-complainant. Many local authorities are reluctant, if not unwilling, to transfer a tenancy from a husband to a separated wife unless she first obtains an order relieving both of them from the obligation to live together. Clearly, to include a non-cohabitation clause in a maintenance order on this ground would be an improper exercise of a magistrate's discretion. But there is some evidence to suggest that legal representatives ask for and obtain a separation order, not for protecting a wife but in order that she may be able to satisfy the local authority that the tenancy of a council house or flat should be transferred into her name.[14]

What, then, is the present extent of the use of the magistrates' power to make a separation order? The analysis of material in a study conducted by the Department of Sociology at Bedford College,

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[12] *Ibid.* at p. 87.

[13] *Ibid.* at pp. 88, 89. If the non-cohabitation clause forms no part of the order as pronounced by the justices in court, the order can be rectified by the deletion of the non-cohabitation clause: *Joliffe* v. *Joliffe* [1965] P. 6.

[14] In *Montgomery* v. *Montgomery* [1965] P. 47, 52, a London borough had written to a wife of a council tenant that it would transfer the tenancy to her, provided that the court (in this case the High Court which had already granted a decree of judicial separation) would grant her an injunction to compel the husband to leave the flat. This the court declined to do on the ground that the wife had no proprietary right in the flat. The court would grant only an injunction to restrain the husband from molesting her and from interfering with her occupation of the flat.

University of London, covered those matrimonial orders in which the wife obtained a maintenance order in her own right and did not obtain maintenance solely in right of her child or children; it would be most unlikely (although not inconceivable) that a wife who for one reason or another was disqualified from maintenance for herself would obtain a separation order. The other limitation upon the results was that not all the courts canvassed answered the question: did the matrimonial order contain a non-cohabitation clause?

The study analysed over 1,200 orders currently in force in 1966 by fifty magistrates' courts randomly selected in England and Wales. Of the 549 live orders for which information was available, in 30 per cent. of the cases a non-cohabitation clause had been inserted in the order of the court. For orders originally made in the two most recent years of the survey—1964 and 1965—the proportion of non-cohabitation clauses rose to 40 per cent. of all orders made. What is perhaps most interesting is that of all the orders with non-cohabitation clauses in only 62 per cent. of the cases was persistent cruelty either the sole ground or one ground of two or more grounds for the application by the wife-complainant. The following tables indicate the number of separation orders and the grounds upon which such orders were made.

TABLE 1

Date Order Made	Number and Ratio of Maintenance Orders with Separation Orders		All Maintenance Orders made (100%)
	Number	%	
Pre-1961	74	24	307
1961–63	39	36	109
1964–65	53	40	133
Total	166	30	549

(Those maintenance orders which contained separation orders were retained and analysed according to the grounds on which the maintenance order had been made. If cruelty was shown—(a) as the only ground, or (b) as a joint ground—then that order was

TABLE 2

Grounds for Separation order	Date Order Made			Total	
	Pre-1961	1961–63	1964–65	Number	%
Persistent Cruelty	41	23	33	97	62
Adultery	18	7	10	35	22
Desertion	6	5	6	17	11
Wilful neglect to maintain	8	—	—	8	5
Total	73	35	49	157	100
Grounds not known:	1	4	4	9	

removed and recorded as cruelty. The analysis then proceeded to " adultery," and so on. The results are shown in Table 2.

From this information it can be calculated that in the two years 1964 and 1965 non-cohabitation clauses were inserted in matrimonial orders in 5,000 cases each year, of which something like 1,100 were made on a ground of application other than persistent cruelty.[15] Further analysis showed that some courts were more inclined to insert non-cohabitation clauses than others. Two of the larger courts in the north of England were examined. In Court A 87 per cent. of orders contained a non-cohabitation clause; in Court B the figure was 33 per cent. Only 55 per cent. of the separation orders made by Court A showed persistent cruelty as the ground of application as compared with 86 per cent. in Court B. For the three London courts in the survey only 14 per cent. of the maintenance orders contained a non-cohabitation clause. Persistent cruelty was the ground of application in 78 per cent. of these cases. One large court in south-west England had only one instance of a separation order out of fifty-five maintenance orders.

What are the reasons for so great a disparity between legal rules and the law in action? One explanation which is suggested by the reported cases is that the non-cohabitation clause is inadvertently not struck out from the printed form. If this were the explanation for most cases, one would expect to find a higher proportion of applications on the grounds of adultery, desertion and wilful neglect to maintain containing non-cohabitation clauses. It might be that inadvertence explains the inclusion of a separation order in these non-cruelty cases, and that where a maintenance order is made on the ground of persistent cruelty magistrates' courts, either defiant or oblivious of the rulings of the High Court, automatically include the non-cohabitation clause in their orders. Observation of the courts suggests that it is the justices' clerks rather than the justices who are responsible. Justices may be blindly making separation orders, if only in cases of persistent cruelty. In this respect they are, of course, failing in their duty to deal with a separation order as " a separate adjudication " from the decision to award maintenance. But if that is so, it is probably because those professionally engaged to guide the Bench are themselves failing in their duties to ensure both a deliberate consideration by the Bench of the power to make a separation order and, when considering such an order, to act in accordance with the rules of law.

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[15] For the two years 1964 and 1965, 32,206 maintenance orders were made. 77·6 per cent. of such orders—24,992—provided for the direct benefit of the wife. 39·8 per cent. of all such orders contained a non-cohabitation order, *i.e.*, 9,947, of which 22·7 per cent. were not made on the ground of cruelty, *i.e.*, 2,258 or 1,129 for each year.

The Magistrates' Association in a recent memorandum to the Law Commission have questioned the value of separation orders. Their recommendation that "The power to make a non-cohabitation order should be abolished" is wise advice that should be accepted.[16]

COLIN GIBSON.*

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[16] The Magistrates' Association: *Annual Report 1968–1969*, 1969, Appendix VI, p. 58.

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STATUTES

The Employer's Liability (Defective Equipment) Act 1969

The Employer's Liability (Defective Equipment) Bill 1969 is law at last. After a two-year parliamentary " struggle " the Bill was steered through the Commons by Mr. Hugh Brown (assisted by the Government in the shape of the Solicitor-General), and through the Lords by Lord Morris of Kenwood. The " struggle " was not the result of any organised opposition, but of the traditional difficulty of finding parliamentary time for a Private Member's Bill. Mr. John Cronin introduced a similar Bill in 1968, but it lapsed; this time Government co-operation has helped towards success.

The Act, which came into force on October 25, 1969, seeks to add to an employer's common law duties with regard to defective equipment by making him liable also for the defective manufacture of equipment. In other words, it seeks to reverse the decision of the House of Lords in *Davie* v. *New Merton Board Mills Ltd.*,[1] although no one pretends that its effect ends there.

In *Davie's* case, a workman was injured by a defective tool supplied to him by his employers. The defect was latent; it was caused by negligent heat treatment during the manufacturing process. The employers had bought the tool from an apparently reputable supplier. At first instance, Ashworth J. held the employers liable.[2] Relying on dicta of Lord Maugham in *Wilson's and Clyde Coal Co.* v. *English* [3] and of Goddard L.J. in *Paine* v. *Colne Valley Electricity Co.*,[4] his Lordship held that an employer could not escape liability for breach of his personal obligation (to take reasonable care to provide safe equipment) by proving that he had taken reasonable care to buy an apparently sound tool from a reputable supplier.

On appeal, the decision was reversed by Parker and Pearce L.JJ., Jenkins L.J. dissenting.[5] The majority in the Court of Appeal were of the opinion that the employers had sufficiently discharged their duty by buying from a reputable supplier a tool whose latent defect they had no means of discovering. On a further appeal, the House of Lords unanimously affirmed the decision of the Court of Appeal.[6] In the words of Lord Reid [7]:

> " . . . Vicarious liability is well recognised and I see no difficulty in principle in extending vicarious liability beyond liability for those who are, strictly speaking, servants, but it would, I think, be going far beyond anything reasonable to

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[1] [1959] A.C. 604.

[2] [1957] 2 Q.B. 368.

[3] [1938] A.C. 57, 88.

[4] [1938] 4 All E.R. 803, 808.

[5] [1958] 1 Q.B. 210.

[6] [1959] A.C. 604.

[7] *Ibid.* at p. 642.

> extend it to cover a case where there was no relationship whatever between the master and the negligent person or his employer at the time when the negligence occurred. . . ."

In a strong dissenting judgment in the Court of Appeal, Jenkins L.J. said this [8]:

> " . . . an employee has to use the tools provided by his employer and has no voice in the selection of the tools or as to the manufacturer or supplier from whom they are obtained. If he is injured through a defect in one of the tools provided by his employer, it is surely not unreasonable that the employer should be held liable if the defect was due to the negligent manufacture of the tool . . .
>
> Otherwise the employee might well be without a remedy. He would not know and might not be able to find out who the manufacturer was . . . At all events, it would . . . be an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer readymade. . . ."

But this expression of social conscience was not concurred in by Jenkins L.J.'s judicial colleagues and superiors. After *Davie's* case, as Professor Webber put it,[9] " . . . masters and men . . . will know . . . that in this branch of the law no change will come save through legislation alone."

It has, however, twice since been shown that the principle enunciated in *Davie's* case is limited to the peculiar facts on which it was decided. In *Taylor* v. *Rover Co. Ltd.*,[10] a workman was injured by a defective chisel supplied to him by his employers. The defect was latent, and the facts of the case were similiar to those in *Davie* except that some four weeks before the accident in question a piece of the same chisel had broken off and slightly injured the employers' leading hand who had been using the chisel at the time but who had not withdrawn it from use. Baker J., sitting at Birmingham Assizes, held that the employers were in breach of their common law duty to take reasonable care to supply reasonably safe equipment to the plaintiff workman, as they were liable for the failure of their leading hand to withdraw the dangerous chisel from circulation.

In the second case—*Pearce* v. *Round Oak Steel Works Ltd.*[11]—the plaintiff was injured at work in the defendants' factory when a fifteen-pound weight on a machine at which he was working fell on his foot. The weight was held by a bolt which broke because of metal fatigue which a routine inspection would not have revealed. The evidence for the plaintiff was that the machine was made in about 1930 and bought by the defendants in 1959. A metallurgist at the factory said he would have expected drawings to be supplied with the machine, giving a specification of the strength of the steel which would have shown it was not strong enough. The defendants had used the machine until the plaintiff's accident without any trouble. The defendants called no evidence themselves at the trial.

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[8] [1958] 1 Q.B. 210, 236–237.

[9] (1959) 12 *Current Legal Problems* 56, 75.

[10] [1966] 1 W.L.R. 1491; [1966] 2 All E.R. 181.

[11] [1969] 1 W.L.R. 595.

The Court of Appeal held that the burden of proof was on the defendants to show that, notwithstanding the latent defect, they could not have avoided the accident by the use of reasonable care in inspection and maintenance and when they bought the machine. Since they had called no evidence, they had not discharged that burden and were liable in damages to the plaintiff.

That was the background against which the Employer's Liability (Defective Equipment) Act 1969 was passed. The Act has been variously described. Its sponsor (Mr. Hugh Brown) described it as a " small but useful piece of social reform " [12] a view echoed in the House of Lords by Lord Morris of Kenwood.[13] The Solicitor-General went so far as to congratulate the sponsor " upon what is shortly to become the successful fruition of a valuable legislative enterprise. . . ." [14]

On the other hand, the most watchful critic of the Bill, the *New Law Journal*, described it as a " monstrosity " which was " about to wreak havoc with the law of tort. . . ." [15]

The strongest opposition in the Commons came from Sir Edward Brown, who saw the Bill as a departure from the fundamental principle that a man is innocent until proved guilty. Sir Edward thought the passing of the Bill would see the bursting of the dam. However, the example he gave merely showed that he did not fully understand the Bill [16]: " If a woman working in a factory goes to her employer and says ' I have dermatitis on my hands,' once this measure becomes law it covers such a case. However, the dermatitis may not have arisen in that factory. It may have happened in her kitchen sink . . ." Sir Edward's extreme view was challenged immediately and he was reminded by Mr. Simon Mahon about the powers of expert medical evidence.[17] Then Mr. Peter Archer asked him to " say on how many occasions he has come across an instance of industrial dermatitis arising from *defective equipment*. . . ." [18] Sir Edward admitted that he knew of no such occasion.[19]

The Act contains only two sections. Section 1 (1) states that

> " where after the commencement of this Act—
>
> (a) an *employee* suffers *personal injury* in the course of his employment in consequence of a defect in *equipment*

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[12] H.C. Deb., Vol. 780, col. 984 (March 21, 1969).

[13] H.L. Deb., Vol. 301, col. 996 (May 1, 1969).

[14] H.C. Deb., Vol. 786, col. 812 (July 8, 1969).

[15] Editorial in (1968) 118 New L.J. 1188–1189. Similar sentiments were expressed in another editorial in (1969) 119 New L.J. 426–427.

[16] H.C. Deb., Vol. 774, col. 1974 (December 6, 1968).

[17] *Ibid.*, col. 1974 (December 6, 1968).

[18] *Ibid.*, col. 1975 (December 6, 1968).

[19] *Ibid.*, col. 1975 (December 6, 1968).

provided by his employer *for the purposes of the employer's business*; and

(*b*) the defect is attributable wholly or partly to the *fault* of a third party (whether identified or not), the injury shall be deemed to be also attributable to *negligence* on the part of the employer (whether or not he is liable in respect of the injury apart from this subsection), *but without prejudice* to the law relating to contributory negligence and to any remedy by way of contribution or otherwise which is available to the employer in respect of the injury."

The italicised expressions require some explanation.

(1) "*Employee*"

This means "a person who is employed by another person under a contract of service or apprenticeship and is so employed for the purposes of a business carried on by that other person. . . ."[20]

(2) "*Personal Injury*"

This includes "loss of life, any impairment of a person's physical or mental condition and any disease."[21]

(3) "*Equipment*"

This is defined as including "any plant and machinery, vehicle, aircraft and clothing."[22]

Originally, "equipment" was not defined in the Bill but in the House of Lords Lord Mitchison proposed an amendment to clarify the word, and the amendment was accepted by the House of Commons. Mr. Niall MacDermott welcomed the amendment because he feared that the courts might put a restrictive interpretation on the Bill as a whole[23]:

> "It was for that reason it seemed to me we should make our intention perfectly plain and ensure a definition of the word 'equipment' which would extend to matters which I think we should all like to see it extended to but which, without the definition, might be excluded by judicial decision. . . ."

At first, the view of the Government was that "equipment" did not need defining, but in the end it changed its mind and accepted the amendment. Its reasons were stated thus by the Solicitor-General[24]:

> "It has been realised that if the word 'equipment' were left undefined, the precise relationship between this Bill and the Occupiers' Liability Act 1957 would not be made fully clear. It is essential for the Bill to cover vehicles. These now form

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[20] s. 1 (3).

[21] s. 1 (3).

[22] s. 1 (3).

[23] H.C. Deb., Vol. 786, col. 810 (July 3, 1969).

[24] *Ibid.*, col. 811 (July 3, 1969).

> such a significant proportion of the equipment which is issued to industrial workers that it would be wrong for them not to be covered. If equipment is not expressly defined as including vehicles, it would be possible, perhaps, to argue that, as vehicles are expressly covered by the 1957 Act, they are not intended to be covered by the Bill. . . ."

(4) "*For the purposes of the employer's business*"

The Act says that "'business' includes the activities carried on by any public body."[25]

The expression "for the purposes of the employer's business" and the definition of "employee" already given make it clear that there is no liability under the Act unless the defective equipment was provided by the employer for the purposes of his business. And this presupposes that the "employer" has a "business." The expression might present difficulties in interpretation. For example, during the second reading of the Bill in the House of Commons, Sir Edward Brown brought up the question of the gardener employed by a man of moderate means. While the gardener is digging, part of the fork breaks off because of defective material and pierces his body. Would there be liability under the Bill in such circumstances?[26] The sponsor, Mr. Hugh Brown (not a lawyer), replied irrelevantly that he thought not—"unless there was a direct contractual relationship between the employer and such a man."[27] There would, of course, always be a "direct contractual relationship" in such circumstances, whether that relationship was of master and servant or employer and independent contractor. No doubt what Mr. Brown was trying to emphasise was that, under the Bill, there is no liability towards independent contractors. This is made clear by the definition of "employee" given in section 1 (3) as a person employed under a "contract of service or apprenticeship." There is no mention of persons employed under "contracts for services." At any rate, Mr. Archer stepped in with an alternative solution to Sir Edward Brown's gardening tragedy[28]: "Would not the possible answer be that the Bill applies to equipment provided by the employer for the purposes of the employer's business, and would not apply in this case unless the employer runs the garden for business?"[28] The Solicitor-General agreed saying that ". . . The phrase 'employer's business' has a limiting and restrictive effect. In my view, it excludes the contract between a man who possesses a garden and his gardener."[29]

The expression certainly does have a limiting effect. It is restrictive enough to exclude claims by all purely domestic servants; the Act does nothing to provide a remedy against her employer to a cleaner injured in the circumstances of a case like *Cook* v.

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[25] s. 1 (3).

[26] H.C. Deb., Vol. 774, cols. 1969–1970 (December 6, 1968).

[27] *Ibid.*, col. 1970 (December 6, 1968).

[28] *Ibid.*, col. 1970 (December 6, 1968).

[29] *Ibid.*, col. 1986 (December 6, 1968).

Broderip and Another.[30] Mrs. Cook was employed by Major Broderip to clean his flat. When cleaning an electric fire she was injured by an electric shock caused by a faulty socket. Mrs. Cook was awarded damages against the electrician who fitted a new switch fuse because he had negligently failed to test for reversed polarity. But against Major Broderip she got nothing. O'Connor J. acquitted him of any negligence in his choice of contractor, decided that he was not in breach of duty under the Occupiers' Liability Act 1957, and, applying *Davie* v. *New Merton Board Mills Ltd.*,[31] held that an occupier of property (whether or not he also be an employer of labour) did not guarantee the work of specialist contractors which he had no possible means of checking.

(5) " *Fault* "

The Act says that " ' fault ' means negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland." [32]

It is important to note that the Act does not make an employer liable in every case where an employee is injured by defective equipment provided by the employer. There is no question of absolute liability. Although the Act introduces a new rule making the employer liable without any *fault of his*, the employee still has the burden of proving that the defect in the equipment was the *fault of a third party*. There will be no liability under the new Act if there has been no " fault " on the part of anyone and the defect is latent. If the defect is patent, the employer may be liable on ordinary common law principles if he knew or ought to have known of the defect.

(6) " *Negligence* "

The introduction of this word seems to make it clear that the new action is intended to be for the tort of negligence and not for breach of contract, thus reinforcing the words of Lord Reid in *Davie's* case [33]: " A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as a part of the law of tort. . . ." However, if this view is correct it could lead to difficulties in procedure which could not be solved by applying the decision in *Matthews* v. *Kuwait Bechtel Corporation.*[34]

(7) " *But without prejudice etc.*"

The fact that the employer is liable to compensate the employee does not exonerate the manufacturer or supplier from liability if he is at fault. Thus the employer can recover his loss in contract or in tort.

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[30] Unreported, but see (1968) 112 S.J. 193; 206 E.G. 128; 118 New L.J. 228 and *The Times*, February 27, 1968.

[31] [1959] A.C. 604.

[32] s. 1 (3).

[33] [1959] A.C. 604, 642.

[34] [1959] 2 Q.B. 57.

During the Second Reading of the Bill in the House of Lords, the Earl of Dundee wondered whether the Bill would *compel* the injured employee to sue the employer and leave the employer to go against the manufacturer.[35] Lord Morris of Kenwood assured him that the employee still had a choice under the Bill; *i.e.*, whether to sue the employer or the manufacturer.[36] And certainly there appears to be nothing in the Act to deprive the employee of his action against the manufacturer under *Donoghue* v. *Stevenson*.[37]

The effect of section 1 (1) is reinforced by the important section 1 (2), which says "In so far as any agreement purports to exclude or limit any liability of an employer arising under subsection (1) of this section, the agreement shall be void." Thus the defence of *volenti non fit injuria* is expressly excluded, although section 1 (2) was not strictly necessary for this purpose. Section 1 (1) imposes a statutory duty on the employer and it was established in cases like *Baddeley* v. *Earl Granville*,[38] *Davies* v. *Owen Ltd.*[39] and *Wheeler* v. *New Merton Board Mills Ltd.*[40] that *volenti* is no defence to an action for breach of statutory duty. Perhaps the draftsman had in mind the limitation to this principle introduced recently by the House of Lords in *I.C.I. Ltd.* v. *Shatwell*.[41]

Section 1 (3) is a definition section already referred to. Section 1 (4) provides that section 1 is binding on the Crown and that "persons in the service of the Crown shall accordingly be treated for the purposes of this section as employees of the Crown if they would not be so treated apart from this subsection."

Section 2 provides for citation and commencement. It also declares [42] that the Act does not extend to Northern Ireland, but at the same time provides that "Nothing in the Government of Ireland Act 1920 shall prevent the Parliament of Northern Ireland from making laws for purposes similar to the purposes of section 1 of this Act." [43]

The Act is to be welcomed. It has been aptly justified by Lord Morris of Kenwood in these words [44]:

> "[The employer] is much more likely to have the information and the organisation to mount a successful action against a negligent third party, and if such an action cannot be brought he can much more easily stand the loss. He will already be insured against employers' liability and further cover against liability in these cases will not be a significant burden for him to bear. . . ."

TERENCE INGMAN.

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[35] H.L. Deb., Vol. 301, col. 1006 (May 1, 1969).

[36] *Ibid.*, col. 1010 (May 1, 1969).

[37] [1932] A.C. 562.

[38] (1887) 19 Q.B.D. 423 (D.C.).

[39] [1919] 2 K.B. 39.

[40] [1933] 2 K.B. 669 (C.A.).

[41] [1965] A.C. 656.

[42] s. 2 (4).

[43] s. 2 (3).

[44] H.L. Deb., Vol. 301, col. 999 (May 1, 1969). Such insurance is made compulsory by the Employers' Liability (Compulsory Insurance) Act 1969, which received the Royal Assent on October 22 and which comes into force on a day to be appointed by the Secretary of State.

REPORTS OF COMMITTEES

THE LAW COMMISSIONS' FIRST REPORT ON EXEMPTION CLAUSES[1]

THIS Report is the first fruit of the Law Commissions' consideration of exemption clauses in contracts and is confined to implied terms in contracts of sale of goods (contracts for the supply of services and clauses excluding liability for negligence will be the subject of a later report). It is however wider in scope than its title suggests, for it also deals with the whole question of re-drafting the implied conditions and warranties in the Sale of Goods Act. The two aspects of the First Report can therefore be dealt with separately.

Implied terms

The Report recommends the repeal and re-enactment of sections 12 and 14 of the Sale of Goods Act 1893, a new subsection for section 13, and the addition of some relevant definitions to the definition section (s. 62).[2]

Title. No real change is proposed to section 12 (implied condition and warranties of title), though there is a new draft to take account of the recommendations as to exemption clauses later described. The main point of interest is that the proposal of the Law Reform Committee[3] that the principle laid down in *Rowland* v. *Divall*[4] should be changed is not yet to be implemented. It will be recalled that in that case a buyer who lost the goods to the true owner because of his seller's lack of title was entitled to the return of the price in full even though he had had the use of the goods for some months. The Law Reform Committee thought that the buyer should give credit for any benefit he may have had from the goods. The Law Commissions agree with this in principle, but point out a number of practical problems that would arise[5] and accordingly conclude that legislation must await a study of the rules relating to the law of restitution.

Description. Criticisms of section 13 (implied condition of correspondence with description)—that there is no need to have an implied term when the description is already an express term, that the section is applied too strictly,[6] and that description is a fundamental term anyway—do not impress the Commissions, for section 13 "has proved to be a valuable instrument for the protection of the buyer." But there is one question: does section 13 apply where goods are sold in a self-service store without any words being spoken? The Commissions are in no doubt that it should, and to this end propose a new subsection (2) for section 13: "A sale of goods shall not be prevented from being a sale by description by reason only that, being exposed for sale, they are selected by the buyer." Unfortunately it is arguable whether this amendment would meet the difficulty, for it assumes that the sale is by description in the first place. It should be made clear that neither spoken nor printed words are necessary to constitute a description.[7]

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[1] The Law Commission and the Scottish Law Commission: Exemption Clauses in Contracts—First Report: Amendments to the Sale of Goods Act 1893, July, 1969 (Law Com. No. 24; Scot. Law Com. No. 12).

[2] References to sections hereafter are to the Sale of Goods Act 1893.

[3] Twelfth Report, Transfer of Title to Chattels, 1966; Cmnd. 2958, para. 36. See (1966) 29 M.L.R. 413, 418.

[4] [1923] 2 K.B. 500, C.A.

[5] para. 15. [6] As in *Arcos Ltd.* v. *Ronaasen* [1933] A.C. 470, H.L.

Fitness for purpose. The implied condition of fitness for purpose (and that of merchantable quality) should apply to every sale in the course of a business, whether or not the seller is a dealer in such goods.[8] The proviso to section 14 (1) (sale under a patent or trade name) should disappear, and the new drafting should make it clear that it is for the seller to prove the absence of any reliance on his skill or judgment (which is how the courts have interpreted the present subsection); moreover, the seller should also be able to escape liability if he can show that it was unreasonable for the buyer to rely on the seller's skill or judgment.

Merchantable quality. The implied condition should cease to be dependent on the sale being "by description." The Commissions recommend a statutory definition of "merchantable quality" based on what it is reasonable to expect having regard to the price, any description and all other circumstances. An ambiguity has crept in, however, for the definition refers to "fit for the purpose or purposes for which goods of that kind are commonly bought": the Report makes it clear that this means "fit for any one or more of the purposes," whereas it might be taken to mean "fit for all of the purposes," which would change the law radically against the seller.[9] The present proviso to section 14 (2), excluding the condition as to defects which an examination actually made ought to have revealed, is to remain, with a further exception as regards defects specifically drawn to the buyer's attention. There should be no exception for second-hand goods or "seconds," for the definition of merchantable quality is sufficiently flexible to take such a description into account, and, they say, a seller in the course of a business should not be permitted to sell useless rubbish.

Sale by sample. No amendment of section 15 is proposed, though the new definition of merchantable quality should apply for the purpose of section 15 (2) (*c*).

Third parties. The Commissions' Working Paper suggested that implied terms should be enforceable by any person affected by the goods.[10] But in view of doubts expressed by insurers and lawyers they are not pressing this pending a separate study of products liability, though it remains a live issue.

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[7] See Lord Wright in *Grant* v. *Australian Knitting Mills Ltd.* [1936] A.C. 85, 100, P.C., cited in the Report but not incorporated into the draft subsection.

[8] "Thus, for example, where a coal merchant whose business it is to supply coal sells one of his delivery vehicles the condition of fitness should be implied" (p. 11, n. 30).

[9] But note the proposed subsection in the draft Act (s. 8 (4)) permitting the court to look at the Report in order to interpret the Act.

Exemption clauses

This part of the Report is undoubtedly of great importance, for the main recommendation is that exclusion of the implied terms in the Sale of Goods Act should not be possible on a "consumer sale." This would be achieved by new subsections added to section 55. As to title, however, it would be possible for the court to find an intention that the seller is not to transfer the property in the goods, but only such title as he has, in which case the present implied condition of right to sell (s. 12 (1)) would not apply. In this event implied warranties of quiet possession and disclosure of encumbrances would not be capable of exclusion in any contract of sale, whether or not a consumer sale.

The definition of "consumer sale" involves three elements: the seller (he must be a seller in the course of a business); the goods ("of a type ordinarily bought for private use or consumption"); and the buyer (a person who does not buy or hold himself out as buying the goods in the course of a business).[11] But in connection with the nature of the buyer the Commissions are equally divided: some members wish to give the courts some control over exemption clauses in all sales to business buyers,[12] while the others wish the courts' power of control to be limited to business buyers who do not buy the goods for sale or disposal in the course of the business, or for consuming or processing them, or for use in providing a service.[13] There is also a difference of opinion as to the control of exemption clauses in sales by auction.[14]

Conclusion

This is an excellent Report, and although I wish it had gone farther in some respects I hope that it will be implemented by legislation [15] without delay. The drafting wisely is in a form which permits the new provisions to be slotted into the existing Act with the minimum difficulty: it is to be hoped that when the Bill is published it will contain a provision based on section 20 (5) of the Administration of Justice Act 1928 instructing the Queen's Printer to print all future copies of the Sale of Goods Act 1893 in its amended form.[16]

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[10] *Cf.* Consumer Protection Act 1961, s. 3 (1), and Uniform Commercial Code, section 2–318.

[11] "Business" includes a profession and the activities of government departments, local authorities and a "statutory undertaker."

[12] Alternative B in the draft Act would make such clauses unenforceable if the buyer could show them to be not fair or reasonable: *cf.* Misrepresentation Act 1967, s. 3, where the onus is on the party seeking to rely on the clause.

[13] Alternative A would give the court a discretion where the business buyer is in this category, *i.e.*, does not buy the goods to deal in or deal with them: *e.g.*, where a shopkeeper buys a heater to heat his shop.

[14] See paras. 117–119.

[15] Preferably with Alternative B.

AUBREY L. DIAMOND.

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[16] Preferably incorporating the other amendments that have already been made. Such a provision would for practical purposes obviate the need for a separate Consolidation Bill, which would otherwise be needed.

NOTES OF CASES

OBJECTS, POWER AND ULTRA VIRES

THE modern doctrine of *ultra vires* is now almost a century old. It is a reproach to Parliament that it still exists in its present form. It is a reproach to the courts that it is even now obscure in its details and capricious in its incidence. One of the most obscure areas concerns the application of the doctrine to corporate powers. Cases such as *Parke* v. *Daily News Ltd.*[1] treat exercises of powers directed towards ends other than the financial prosperity of the company as *ultra vires* while others, treating improper exercises of powers as ratifiable, appear to be developing a doctrine of *détournement de pouvoir* in English company law.[2] The latest such decision, *Charterbridge Corporation* v. *Lloyds Bank Ltd.*[3] makes it clear that the cases on exercise of powers cannot all be subsumed under the head of *ultra vires.*[4] What the decision fails to do is to resolve satisfactorily the relationship between express and implied powers in relation to *ultra vires.*

In the *Charterbridge* case the Castleford company, one of a group, had express power to secure on guarantee by mortgage the performance or discharge of any contract of the company or of any other person or company with which Charterbridge had dealings or in whose business it was concerned. Its directors who were also directors of the other companies in the group caused Castleford to grant a second mortgage in favour of the bank to guarantee the indebtedness of other companies in the group. Later, Castleford sold the mortgaged properties to the plaintiff company, but while a first mortgage on the property was discharged by the vendor, the second mortgage in favour of the bank was not. Ultimately, the plaintiff company discovered that Castleford could not make good title and the bank threatened to realise the security. The plaintiff company, which by this time had paid a considerable sum in relation to the property, brought this action for a declaration that the legal charge in favour of the bank was void as being *ultra vires.* It was found as a fact that the officers of Castleford did not consider its interests separately from those of the group. Equally, they did not believe that the transactions were prejudicial to Castleford. The bank's officers did not give separate attention to the affairs of Castleford but were not aware that the transaction was one apt to prejudice its interests.[5]

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[1] [1962] Ch. 927.

[2] *Re W. & M. Roith Ltd.* [1967] 1 W.L.R. 432.

[3] [1969] 2 All E.R. 1185.

[4] *Cf.* Palmer's *Company Law* (21st ed., 1968), pp. 81–82.

[5] [1969] 2 All E.R. 1185, 1188 (G–H).

In the result Pennycuick J. upheld the mortgage. One ground of decision is not the primary concern of this note, but is of some interest. His Lordship held that while directors of a company in a group do not satisfy their duty by looking only to the benefit of the group alone, they are equally not obliged to consider the affairs of the particular company in isolation from the group. The proper test in the absence of actual separate consideration is "... whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company."[6] Such a view could plainly have been taken here. In addition the bank's officers, given the circumstances, could not be treated as knowing that the transactions were not for Castleford's benefit.[7] The case could, on the authority of *Re David Payne & Co. Ltd.*,[8] have been decided on this short ground alone.

Before dealing with this point, Pennycuick J. rejected two defence contentions and it is his Lordship's discussion of these which makes the case a particularly interesting one. The first was that in granting the mortgage the directors were acting for purposes outside the scope of the company's business. Here, however, the evidence was that the granting of the mortgage was reasonably connected with the company's business and the contention therefore failed. The second contention was that the grant of the mortgage was *ultra vires* in that the directors in creating it had regard to the interests of the group rather than to those of the company as such. The claim was based on the principles respecting the exercise of powers laid down in *Re Lee Behrens & Co. Ltd.*,[9] namely, that the validity of grants made under express or implied powers must be determined by asking whether the transaction is (i) reasonably incidental to the company's business, (ii) bona fide, and (iii) done for the benefit of and to promote the prosperity of the company. Pennycuick J. treats (i) as an inappropriate question to ask in the case of express powers, (ii) as relating primarily to directors' duties and perhaps in part to implied powers and (iii) as "... quite inappropriate to the scope of express powers."[10] The difficulties arise from the treatment of considerations (i) and (iii). The treatment of (ii) is, it is submitted, correct. Bona fides is not a term which, in this field, has any precise connotation. Its absence clearly does not imply the presence of dishonesty. In the allotment cases (under express powers) the absence of bona fides need mean no more than that the directors proceeded as they did simply because they paid primary attention to the interest of persons other than the general body of shareholders taken as a whole. Thus share allotments made by directors in order merely to forestall a take-over which the directors regard as undesirable will be an improper exercise of powers even though made for the best of motives.[11] It follows from this that the conduct of directors may be closely connected with the business and eminently honest and yet not be classified as bona fide.

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[6] *Ibid.* at p. 1194 (C–E).

[7] *Ibid.* at p. 1195 (A).

[8] [1904] 2 Ch. 608.

[9] [1932] 2 Ch. 46.

[10] [1969] 2 All E.R. 1185, 1191 (C–D).

But is consideration (iii) relevant to *ultra vires* and if so in what sense? It is submitted that understood as a proposition of substantive law it goes to excess of power only, but evidence bearing on the question whether an exercise of power could be considered to be for the benefit and prosperity of the company goes to *ultra vires* in the case of both express powers (*pace* Pennycuick J.) and implied powers. To say this is to say little more than is already implied in consideration (i), namely, that the power must be reasonably incidental to the company's business. In other words, powers whether express or implied do not have a substantive and independent validity of their own: their validity is limited by a purpose. Parenthetically, it is not clear why the judgment in *Charterbridge* asserts that express powers cannot be read down in this way. Express powers are, after all, read down so as not to justify an illegality.[12] And, as Pennycuick J. himself notes, *Re Introductions Ltd.*[13] is an authority for the proposition that a power does not stand on its own but must be exercised in order to promote the company's objects. If this be accepted, evidence relevant to consideration (iii) clearly bears on both issues of *ultra vires* and excess of powers and the intention of the directors may be very relevant on the *ultra vires* issue. For if the view that the intention of the directors, however colourable it may be, is never relevant to *ultra vires* in the case of express powers but may be relevant in the case of implied powers is accepted, then an unjustified distinction between the two must be drawn.[14] In the case of implied powers alone would it be proper to ask whether the transaction plainly not being directed toward the prosperity of the company, fell outside the scope of the power reasonably inferred and was therefore *ultra vires*? Pennycuick J.'s analysis and assertion that the purpose for which express powers are exercised has no relation to the *ultra vires* issue is seemingly directed towards showing that *Re David Payne & Co. Ltd.*[15] is not a benevolent exception to the *ultra vires* doctrine. But the cost of assimilating this judgment by according absolute validity to acts attributable to any express power is to create inconsistencies elsewhere and notably in relation to *Re Intro-*

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[11] *Hogg* v. *Cramphorn Ltd.* [1967] Ch. 254; *Bamford* v. *Bamford Ltd.* [1969] 2 W.L.R. 1107 and see *Harlowe's Nominees* v. *Lakes Entrance Oil Co. (Pty.) Ltd.* (1968) 42 A.L.J.R. 123.

[12] *Ridge Securities* v. *I.R.C.* [1961] 1 All E.R. 275 and see *Peter Buchanan Ltd.* v. *McVey* [1955] A.C. 516n. (Eire S.C.) cited with approval in *Govt. of India* v. *Taylor* [1955] A.C. 491, 510.

[13] [1969] 2 W.L.R. 791.

[14] Gower, *Modern Company Law* (3rd ed., 1969) at pp. 91–92 appears to share these reservations.

[15] [1904] 2 Ch. 608.

ductions Ltd. where the scope of the power is read down in the light of its purpose: that of effectuating the objects of the company.

The great merit of *Charterbridge* is however to provide a basis upon which most of the difficult cases in this area can be explained. *Re Lee Behrens Ltd.*[16] (a case on express powers) becomes a decision on excess of powers because the directors failed adequately to direct their minds to the question whether what was being done was for the benefit of the company. *Re W. & M. Roith Ltd.*[17] can be similarly explained. The making of the service agreement fell within an express power and could have been made to promote the prosperity of the company. The circumstances were, however, suspicious and the directors failed to give evidence as to their state of mind which would have rebutted the inference that they had not considered the interests of the company. The transaction was therefore a voidable excess of power.[18] By contrast, *Parke* v. *Daily News Ltd.*[19] is correctly classified as a case of *ultra vires*. The payments were purportedly made under an implied power. They were gratuitous in character and were found as a fact to bear no relation to the continuing business interest of the company. Any implied power to make gifts must be read down as a power to make gifts for the benefit of the company. The gift therefore failed as not being reasonably incidental to the business of the company (consideration (i)). Of course the evidence also disclosed that (ii) and (iii) had not been observed and it had an undifferentiated relevance to all the issues. The same result should follow even if the power to make gifts is express unless indeed the power is explicitly stipulated to allow for gifts which bear no relation to the interests of the company as that concept is understood in English company law.

Ridge Securities Ltd. v. *I.R.C.*[20] is similar. In that case there is an affirmative finding that the issue of debentures was in fact a concealed gift wholly unrelated to the business interests of the grantor companies and therefore outside any power which might reasonably be implied. It may also be explicable as involving an unlawful return of capital.[21] On the other hand, those cases in which gifts were upheld do stress a fairly close connection between the gift (or disposition) and the business of the company. Thus, gifts to foster research relevant to the companies' activities have been upheld,[22] as have *ex gratia* payments by insurance companies in respect of excluded losses,[23] payments out of profits to employees [24] and the payment of pensions to widows of ex-employees on the footing that such payments encouraged persons to enter the employ of the company.[25]

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[16] [1932] 2 Ch. 46.
[17] [1967] 1 W.L.R. 432.
[18] See Wedderburn (1967) 30 M.L.R. 566.
[19] [1962] Ch. 927.
[20] [1964] 1 All E.R. 275 at pp. 287–288.
[21] Gower, *Modern Company Law* (3rd ed. 1969), at p. 91.
[22] *Evans* v. *Brunner Mond & Co. Ltd.* [1921] 1 Ch. 359.
[23] *Taunton* v. *Royal Insurance Co.* (1867) 2 H. & M. 135.
[24] *Hampson* v. *Price's Patent Candle Co.* (1876) 45 L.J.Ch. 437.

Will this requirement, be it cynical or realistic, continue to apply to gifts made under implied powers but never to those made under express powers? Can companies by incorporating unqualified powers to make gifts in objects clauses now give full scope to social conscience as distinct from commercial benefit?[26] It will be interesting in this respect to see to what extent the apparent contrast posed by Pennycuick J. between express and implied powers receives judicial support in the future. At the least, whatever one's views concerning the social conscience of companies, it is to be hoped that the distinction which Pennycuick J. draws between excess of power and *ultra vires* will be sustained.

L. H. LEIGH.

THE ROAD SAFETY ACT 1967 AND THE COURTS

IT was predictable that the offence under section 1 of the Road Safety Act 1967 [1] would provide the courts with many fiercely contested cases since disqualification from driving normally follows conviction. At first the courts appear to have struggled to ensure that the Act was not deprived of all effect, but then three cases [2] made the policeman's task in prosecuting motorists for this offence seem almost impossible. The main difficulty lies in the drafting of the Act; the offence consists of the motorist driving with an amount of alcohol in his body above a prescribed limit and the police following a very complex procedure to prove it. The police not only have to show that the accused falls within the terms of the Act, but also that they carried out the relevant tests in accordance with section 2 and 3. It might be comforting to see the liberty of the private individual being so well protected, but it would be absurd if countless motorists could walk unscathed from the courts when they had clearly committed the offence under section 1 simply because the police had failed to comply with every minute detail of two sections which defy accurate interpretation. Recently, however, the House of Lords has made a determined effort to assist the police in enforcing the pro-

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[25] *Henderson* v. *Bank of Australia* (1889) 40 Ch. D. 170.

[26] A dispute alluded to by Gower, *op. cit.* at p. 92, and see Dodd, "For whom are Corporate Managers Trustees" (1932) 45 Harv.L.Rev. 1145; Berle, "For whom Corporate Managers are Trustees" (1932) 45 Harv.L.Rev. 1365.

[1] Driving or attempting to drive a motor vehicle having consumed alcohol in such a quantity that the proportion in the motorist's blood exceeds 80 milligrammes of alcohol in 100 millilitres of blood. This note will not be concerned with the offence of being in charge of a motor vehicle in similar circumstances.

[2] *Pinner* v. *Everett* [1969] 1 W.L.R. 1266; [1969] 3 All E.R. 257. *Durrant*, *The Times*, October 16, 1969. *Webber* v. *Carey* [1969] 1 W.L.R. 1351; [1969] 3 All E.R. 406.

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visions of the Act,[2a] and the Minister of Transport will shortly decide whether further legislation is needed.

Two problems in particular have caused the courts great difficulty. The first concerns the phrase " driving or attempting to drive " and the second arises from the fact that the police must prove that the device used to test the accused's breath was one approved by the Ministry.

The phrase " driving or attempting to drive " appears in sections 1 and 2 of the Act.[3] As far as section 1 is concerned the phrase can be given a perfectly literal and sensible meaning. It is, however, rather impracticable to expect a policeman to take a specimen of breath from " any person driving " if this were given a strictly literal interpretation. A meaning had to be given which would cover the case of a motorist who had switched off his engine and had got out of his car to talk to the policeman who had stopped him. In *Price*,[4] Lord Parker C.J. felt that " any person driving or attempting to drive " meant any person who in general terms could be described as the driver. This would clearly cover a person who had left his car temporarily, but it would also cover a person who had not actually driven for a considerable length of time.[5] Lord Morris of Borth-y-Gest, in *Pinner* v. *Everett*,[6] pointed out that whereas anyone who fell within the meaning of " any person driving " could also be described as " the driver," the reverse was not necessarily true. Their Lordships clearly felt that the phrase " the driver " was too wide and, as it was not actually used in the statute, should not be used.

In that case the police formed their suspicions that the motorist had alcohol in his body several minutes after they had stopped him to inform him that his number plate was not properly illuminated. Since the prosecution agreed that the accused had not committed a traffic offence [7] they were forced to show that the police had formed these suspicions and requested the first specimen of breath at a time when the accused was still a " person driving." The motorist's appeal to the House of Lords was allowed on the ground that he was no longer a " person driving " within the meaning of section 2, although he had presumably committed the actual offence under section 1. What, then, does the phrase " any person driving or attempting to drive " mean? Clearly it covers the motorist who is forced to stop in a traffic jam, even if he switches off his engine. Lord Morris said, " In my view there are the clearest possible indications that the ' person driving ' may still be the ' person driving ' even after the vehicle is no longer ' in motion '." [8]

[2a] *D.P.P.* v. *Carey*, *The Times*, December 3, 1969.

[3] In s. 1 it appears as shown in note 1 (above). In s. 2 the police constable may require a person who is driving or attempting to drive to provide a specimen of breath for analysis if he suspects that person has alcohol in his body (this suspicion must therefore be formed of a person driving or attempting to drive) or if he suspects that he has committted a traffic offence while the vehicle was in motion.

[4] [1968] 1 W.L.R. 1853; [1968] 3 All E.R. 814.

[5] For example, a person who took his family shopping by car could still be described in general terms as the driver while they are walking round the town.

[6] *Supra.* The test of whether a person has finished his journey was also rejected by the House of Lords.

[7] For definition of traffic offence see Road Safety Act 1967, s. 3 (8).

Apart from this, however, their Lordships seemed content to say that it was a question of fact and degree in every case. Lord Reid was prepared to say that a person could still be described as " driving " if he stopped to read a map or got out to buy a newspaper from a kerbside vendor, but not if he went shopping or sat in the car while a passenger went shopping. Lord Guest formulated a test which is now in current use when he said, " A person might be still said to be driving when he leaves the vehicle for a purpose connected with the driving of the vehicle, such as filling up with petrol or changing a wheel." [9]

If, however, the motorist parked his car and walked to a shop to buy some motor oil or motor accessories he would surely not be a " person driving " but a mere shopper even though his purpose in leaving the car was connected with driving. It would be ludicrous for the courts to have to discover the purpose for which a man left his car in order to decide whether he was a " person driving." [10] Their Lordships, Lord Morris dissenting, came to the conclusion that as the test was not, in fact, taken for twenty minutes after he had been stopped, he was no longer a " person driving." With respect, it is submitted that the judgment of Lord Morris is to be preferred. In his view the appellant was still a " person driving " when he was being informed of his dirty and unilluminated number plate and it was during this early period that the police first formed their suspicions that he had been drinking and had requested a specimen of his breath. The reason the test was not taken until considerably later was because the appellant contested their right to test him. A strict application of Lord Guest's test would mean that even if the police smelt his breath within the first few seconds, he would still not be a " person driving " providing that he had got out of the car to talk to the police, since talking to the police is not a purpose connected with driving.

The case of *Stevens* v. *Thornbarrow* [11] illustrates how application of these principles will secure the acquittal of even more motorists. In that case Lord Parker C.J. felt compelled to allow the motorist's appeal when the policeman's first suspicions had not been formed until twenty minutes after the appellant had pulled up at the side of the road and switched off his engine. During the twenty minutes he had been talking to three friends in the car. Lord Parker said that the justice had wrongly decided tó apply the "driver test" and had not recognised its disapproval by the House of Lords. He was no longer driving since he was doing something which was totally unconnected with driving.[13]

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[8] [1969] 1 W.L.R. 1275; [1969] 3 All E.R. 261.

[9] [1969] 1 W.L.R. 1279; [1969] 3 All E.R. 264.

[10] Does this mean that a motorist who leaves his car to relieve himself (a far more probable reason for someone who has been drinking to leave the car) ceases to be a person driving? His purpose in leaving the car is surely not connected with driving.

[11] *The Times*, October 24, 1969.

A similar protection would appear to be afforded the motorist by the decision in *Durrant* [14] where a motorist who had been involved in an accident [15] first gave help to the injured party and then drove his car away to park it. On return to the scene of the accident he informed the policeman in charge that he had been driving the car involved in the accident. The breath tests and blood tests which were administered proved positive. His defence was that he felt so upset by the accident that, after parking the car, he drank a double brandy. It therefore followed that the test made would only disclose information as to the amount of alcohol in his body at the time when the test was made and not the amount at the time of the accident. His Lordship allowed the appeal remarking that the Act was now "full of loopholes." He said that there was obviously a danger that motorists would be tempted to try this defence, but there was no way in which this could be avoided. It would be up to the magistrates and others to decide when such evidence was being fabricated. Quite clearly it will be a temptation for motorists who are involved in accidents to park their car and have a drink before the police arrive. On the other hand where the motorist is stopped under section 2 (1) it would be of little avail to him to reach for his hip flask as the policeman approaches since he would still at that time be a "person driving."

The second major development has been over the necessity for the police to show that they used a Ministry approved device to obtain the specimens of breath. The problems concerning hearsay evidence were settled by the decision in *Clarke*,[16] but as one gap was plugged another appeared. In *Webber* v. *Carey* [17] the Divisional Court allowed a motorist's appeal on the ground that proof that the correct device was used also included proof that the instructions of how to use that device were followed.[18] Here it was fatal to the prosecution's case that twenty minutes had not elapsed since the last drink. The House of Lords reversed the decision of the Divisional Court on the ground that it was no defence for a motorist who had been tested later to produce evidence that there had not been a twenty-minute interval between his last drink and the test.[19] Lord Dilhorne said that the Act clearly required proof that the device used was one approved by the appropriate Minister, but the instructions did not form an integral part of the device. Lord Diplock stated that all the police constable had to show was that when he administered the blood test he bona fide believed that the indication of the blood alcohol level given by the device was not falsely high. If, however, the police constable knew or had reason to suppose that the motorist had been drinking within the last twenty minutes, according to Lord Dilhorne, he should wait until satisfied that the twenty minutes had elapsed. It is submitted that provided the requirement to provide a specimen of breath is made while the person is still a person driving or attempting to drive,[20] it will not be a defence for the accused to say that since he had waited for the twenty minutes to pass he was not a person driving or attempting to drive at the time the test was taken. Presumably if the motorist refuses to wait or continues to drink from a hip-flask he can be arrested for failing to supply a specimen of breath under the provisions of section 2 (5) of the Act.[21]

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[13] It is difficult from Lord Guest's speech to infer that this test was applicable to someone who was still in his driving seat. See also *Purvis* v. *Hogg* (1969) 113 S.J. 388, where the motorist was held not to have been a "person driving" after having been slumped unconsciously over his driving wheel for twenty minutes after he had previously driven down the wrong side of the road.

[14] *The Times*, October 16, 1969.

[15] By s. 2 (2) where there has been an accident the police constable may require anyone whom he believes to have been driving a car involved in the accident to provide a specimen of breath for analysis. Here the requirement can be made of a person who is no longer driving or attempting to drive.

[16] [1969] 2 W.L.R. 505; [1969] 1 All E.R. 924. See also *Miller* v. *Howe* [1969] 1 W.L.R. 1510; [1969] 3 All E.R. 451.

[17] [1969] 1 W.L.R. 1351; [1969] 3 All E.R. 406.

[18] The instructions specify, *inter alia*, that the person who is filling up the bag should not have drunk any alcohol for at least 20 minutes and should not have just been smoking a cigarette.

Peter Seago.

Industrial Accidents: Education and Enforcement

Once again, in *Boyle* v. *Kodak Ltd.*,[1] the House of Lords has been asked to delimit the hazy borderline between the respective obligations of employer and worker for workplace safety.

The plaintiff was a skilled and experienced painter, well used to working from ladders. On the day of his accident he was engaged in painting the outside of a large oil storage tank belonging to his employers. In order to reach the upper part, it was necessary to work from a ladder, the top of which had to rest on a rail running around the rim of the tank. Good practice, and the Building Regulations, required that the upper end of this ladder be lashed to the rail before it was safe to use. Mr. Boyle was aware of this requirement; but while he was climbing the ladder to lash it securely in position, it slipped, precipitating him to the ground twenty feet below.

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[19] *D.P.P.* v. *Carey*, *The Times*, December 8, 1969.

[20] It is suggested that if Lord Morris' view (in *Pinner* v. *Everett*, *supra*) of when a person can be said to be driving or attempting to drive were adopted this loop-hole would be closed.

[21] See also the Court of Appeal's decision in *Jones*, *The Times*, December 4, 1969. The Act does not require the test to be made in a public place, but that the person tested should have been driving or attempting to drive on a public place. Clearly a person who has driven into his own garage may have ceased altogether to be a person driving and thus may no longer be required to take the test, but this is because he has ceased to be a person driving and not because he is no longer in a public place.

[1] [1969] 2 All E.R. 439.

Mr. Boyle claimed damages for his injuries, founding both upon the common law duties of his employers to instruct him in the safe method of carrying out his tasks, and upon a breach of regulation 29 (4) of the Building Regulations 1948 [2]: "Every ladder shall as far as practicable be securely fixed so that it can move neither from its top nor its bottom point of rest." There was another way, via a fixed staircase, to the top of the oil tank, so that it would have been "practicable" for Mr. Boyle to secure his ladder by lashing it to the rail before he climbed up it; thus prima facie there had been a breach of the regulation on the part of someone. The plaintiff maintained that, under the scheme of the Act and Regulations [3] this breach was to be attributed to his employer, Kodak Ltd.

The trial judge [4] rejected the plaintiff's claim at common law, as he considered that, as a skilled and experienced man, he had no need of instruction nor supervision in practical matters. The claim based upon the employer's statutory duty was also rejected. Although the defendants conceded that, in the circumstances, the plaintiff's method of securing the ladder involved them in a breach of statutory duty, there was good authority [5] for the contention that an employer was not liable in damages for breach of statutory duty, where the breach was the sole fault of the plaintiff.

The learned judge was thus ruling, by implication, that there was no duty upon the defendants to involve themselves in the decision of Mr. Boyle as to how he should carry out his work so to comply with regulation 29 (4).

Chapman J.'s judgment was affirmed in the Court of Appeal, and Mr. Boyle appealed to the House of Lords, who unanimously reversed the decision of the Court of Appeal.[6]

Lord Reid observed that it was common ground that Kodak Ltd. might be liable in damages for what was ostensibly the plaintiff's breach, but only if they were in some way at fault. He went on [7]:

> "It would be absurd if, notwithstanding the employer having done all he could reasonably be expected to do to ensure compliance, a worker, who deliberately disobeyed his employer's orders and thereby put the employer in breach of a

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[2] S.I. 1948 No. 1145, made under the Factories Act 1937; see now the Construction (Working Places) Regulations 1966, S.I. 1966 No. 94.

[3] Factories Act 1961, ss. 127 and 155; Building Regulations 1948, reg. 4.

[4] Chapman J.

[5] *Manwaring* v. *Billington* [1952] 2 All E.R. 747; *Ginty* v. *Belmont Building Supplies Ltd.* [1959] 1 All E.R. 414.

[6] This account of the proceedings in the High Court and the Court of Appeal is taken principally from Lord Reid's opinion, pp. 439–443.

[7] p. 440.

> regulation, could claim damages for injury caused to him solely by his own wrongdoing . . ."

To prevent any injustice of this type the courts had introduced a further test, namely, whose fault had caused the accident?

His Lordship noted that the trial judge had expressly rejected the proposition that the common law required an experienced workman to be supervised or instructed in practical matters. But he questioned the simple application of this ruling to the case based upon statutory duty. Mr. Boyle's contention was not that he did not know his business, but that he did not understand the application of the Regulations to his work.

Employers were bound to know their statutory duty, and to take all reasonable steps to prevent their men from committing breaches. It might be that, where compliance with Regulations involved no more than a skilled man would know from his practical experience to be necessary, the employer would be under no duty to instruct his men as to their duty. But the case before him was different. He considered that any skilled man, going by his experience, would have concluded that what the plaintiff did was the correct manner of doing the job [8]:

> ". . . the respondents ought to have realised this and instructed their men accordingly. So they have not proved that they did all they could reasonably be expected to do to ensure compliance and they cannot rely on this defence so as to avoid their absolute vicarious liability under the regulation."

Lord Hodson [9] agreed that the appellant was in breach of the regulation solely through his misunderstanding of its import. This misunderstanding could have been cured by the respondents, if they had given him the type of instructions given in *Manwaring's* case.[10] Then the respondents would have done all that could have been expected of them.

Lord Diplock pointed out the need, in this type of case, for some wrongdoing on the employer's part independent of that of the plaintiff [11]: "For the legal concept of vicarious liability requires three parties . . . To say 'You are liable to me for my own wrongdoing' is neither good morals nor good law." He remarked that the necessary wrongdoing might consist of a failure to ensure that all those persons through whom an employer must perform his duties understood these duties, and their practical application to the work of the moment. It might be a reasonable assumption on the part of an employer that Mr. Boyle understood these things, but there was evidence that he did not, and the foreman and ganger had taken no steps to instruct him.

Lord Diplock contrasted the common law position with the employer's duties under regulation 29. He agreed that there was

[8] p. 442.

[9] pp. 443–445.

[10] *i.e.*, an order.

[11] p. 446.

no duty at common law to instruct a " craftsman " how to avoid obvious dangers,[12] and went on:

> " But in the present case . . . the risk of the ladder slipping while the appellant was mounting it to lash the top of it was so small that a reasonable man would not have thought it necessary in the interests of his own safety to expend the time and effort and incur the possible loss of bonus which would have been involved in ascending the stairs . . . and lashing the ladder. The more remote the danger in the particular operation on which the employee is engaged the greater the need to instruct him or remind him of the application of the regulation to it." [13]

Taken at its narrowest, their Lordships appear to have decided that an employer must satisfy himself that even his " craftsmen " understand the meaning of particular regulations, and their application to the work. With the greatest respect, this seems so reasonable a conclusion that it is rather hard upon a claimant to have to proceed to the highest court to clarify so straightforward an issue.

An employer must know the law applicable to his operations; this must include the qualifications introduced by terms such as " practicable " and " reasonably practicable." (*E.g.*, there might have been no breach of regulation 29 if the qualification had been " reasonably practicable." [14] Can a workman be expected to know of these matters?

How does an employer ensure that his employees understand the regulations? Does he explain them generally? The term most commonly used by the Law Lords in *Boyle* v. *Kodak Ltd.* is " instructions." How does a worker regard these instructions? As advice or orders? A reading of the opinions in this case does not bring out this distinction with force.

Lord Reid speaks of " instructions "; and then of what an employer might be expected to do to " ensure compliance." However, the weight His Lordship gives to the appellant's degree of knowledge and experience suggests a duty to relieve ignorance, rather than to enforce some degree of discipline. But elsewhere His Lordship speaks of the employers' duty to prevent their men from committing breaches, and added:

> " It may be that if the foreman had merely told him about the regulation, and left it to him to choose, he would have chosen to ignore the regulation. But that would not be doing his best to ensure the observance of the regulation; that implies an order, and there is nothing to show that the appellant would have disobeyed an order." [15]

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[12] At least, not since *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] 2 All E.R. 38, H.L.

[13] pp. 447–448.

[14] *i.e.*, an introduction of "economic," as opposed to purely "technical," factors.

[15] p. 449.

Lord Hodson refers to "instructions," but relates these to the "instructions" given in *Manwaring's* case,[16] which were in fact orders. Lord Diplock stresses the need to ensure that the employee "understands" the regulations, by the giving of instructions. By emphasising the need to instruct in circumstances in which a danger was not obvious, his Lordship appears to be stressing the educational nature of the employer's duty. He does not refer to any "disciplinary" duty.

Not one of their Lordships discussed the duty of an employer toward a skilled worker who appreciated the meaning of regulations, but nevertheless sought to carry out his duties in contravention of these regulations; a far from uncommon situation nowadays when, as Lord Diplock suggested, a bonus might be at stake. Thus the *ratio* of *Boyle* v. *Kodak Ltd.* may be limited to a duty to instruct and educate, without advancing our knowledge of the extent of the duty to enforce. It is uncertain if any duty to enforce now arises at common law,[17] although it has some recognition in the safety codes,[18] and Lord Reid's views in this case lend some support to its existence.[19]

This special need for enforcement, created by the presence of fallible individuals within a dangerous working environment, lies at the heart of the accident prevention problem today. If it is accepted, that employers generally should be obliged to supervise the safety observances of their employees in their daily work, it would be better to set the requirement out clearly in the safety codes, and perhaps unfair to expect the courts to formulate such a controversial duty from the existing common law materials.

R. W. L. HOWELLS.

THE MEANING OF "DISMISSAL" IN THE REDUNDANCY PAYMENTS ACT 1965

HOWEVER much we may agree with Winn L.J. that ". . . academic discussions as to the operation in certain circumstances of the law of contract of repudiations and acceptances, and acceptances of offers, novations and counter offers and so on, should not be allowed to produce waste of time or energy,"[1] nonetheless the drafting of the Redundancy Payments Act 1965 raises these problems in acute form.[2] Nowhere is this more clearly illustrated than in the difficulties concerning the meaning of "dismissal" raised by *Marriott* v. *Oxford & District Co-operative Society Ltd.*[3]

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[16] See note 5, *supra*.

[17] *Qualcast* (*Wolverhampton*) *Ltd.* v. *Haynes* (*supra*).

[18] Factories Act 1961, ss. 155 (2), 161; Mines and Quarries Act 1954, s. 156; Offices (etc.) Act 1963, s. 67.

[19] [1969] 2 All E.R. 439, 442.

[1] In *Marriott's* case, see below, note 3 [1969] 3 All E.R. 1126, 1130C.

[2] See Wedderburn, Note on the Redundancy Payments Act 1965 (1966) 29 M.L.R. 53; Rideout, *Reforming the Redundancy Payments Act* (Institute of Personnel Management).

The facts are simple. Mr. Marriott was employed as a foreman supervisor. The employers ceased to need a foreman and, after some negotiation with the employee, they then gave him five days' notice that his pay would be reduced by £1 per week after five days and they deprived him of his status as foreman. He continued in his employment under protest at the new terms for three or four weeks, then terminated his employment by notice.

His entitlement to a redundancy payment depended upon whether the reduction in pay and status constituted "dismissal" within the meaning of the Act. The Act defines dismissal, for its own purposes, as termination of the contract by the employer, or expiry of a fixed term contract without renewal, or termination by the employee without notice in circumstances such that he is entitled so to terminate it by reason of the employer's conduct.[4] The particular question here was whether there had been a termination of the contract by the employer. Three arguments were put forward on behalf of the employer to suggest that there had been no dismissal, one based upon the Act itself and the other two upon general contract principles.

First, the employer sought to rely upon section 3 (2) (*b*) of the Act, the effect of which is that dismissal is negatived by a re-engagement on different terms within four weeks of the termination of the employment provided that the re-engagement is in pursuance of an offer in writing made by the employer before the termination of the previous contract. In their first decision in this case, the Divisional Court rejected that argument on the ground that the offer in writing had not set out the terms and conditions of employment with sufficient particularity. That point was not appealed to the Court of Appeal, but dicta of all three judges in that court expressed dissatisfaction with that view.[5] Therefore if all the issues in the case had been before them, they would have decided that there had, on the interpretation of the statute, been no dismissal.

The other two arguments were based upon general contract principles. It was suggested that this was a consensual variation of the terms of the contract and hence was not a dismissal. The Divisional Court in their second decision in this case accepted that the alteration of terms was a consensual variation. This conclusion involved two distinct points; first, that the alteration was consensual and, secondly, that it was a variation of the contract rather than a termination followed by a re-engagement. The second point was in fact unnecessary to the decision whether there was a dismissal or not. For once it was accepted that the alteration was consensual, then it could not be a termination of the contract by the employer, as is required by section 3 (1) (*a*). That provision requires a unilateral termination and cannot apply to a consensual termination.[6]

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[3] (a) Industrial Tribunal Decision June 27, 1967 (unreported); (b) appeal to the Divisional Court [1968] I.T.R. 121; (c) referred back to Industrial Tribunal April 8, 1968 (unreported); (d) appeal to the Divisional Court [1969] I.T.R. 125; (e) appeal to the Court of Appeal [1969] 3 All E.R. 1126.

[4] By s. 3 (1) (*a*), (*b*), (*c*). By s. 22 (1), certain legal events resulting in the termination of the contract are treated as termination by the employer.

[5] *Per* Lord Denning at p. 1128G; Winn L.J. at p. 1129C; Cross L.J. at p. 1130I.

Even so, the view of the Divisional Court that this was a variation rather than a rescission and re-engagement is highly questionable. There is sound authority for the proposition that promotion of an employee results in the termination of one contract and the formation of another.[7] The Divisional Court sought to distinguish *Meek* v. *Port of London Authority* on the ground that the transfer of employees from private employers to the Authority necessarily resulted in the formation of new contracts of employment.[8] That is misleading, for the point of the decision was that promotion of the employees, taking place after and separately from the transfer to the Authority, resulted in the formation of new contracts of employment. If promotion and increase in wages has that result, *a fortiori*, demotion and reduction in wages ought to do so, since they are unlikely to be within the contemplation of the original contract.

The Court of Appeal very properly took the view that this whole question was immaterial to the facts in *Marriott's* case because the alteration of terms was not consensual; it was imposed unilaterally by the employer. Thus Lord Denning: "The question is whether the letter of January 24, 1967 was an offer [by the employer to Mr. Marriott] or a dictation to him of the terms on which he was to work. On the whole I think it was not an offer. It gave him no option." [9] This emphasis upon the reality of consent to variation of the terms of employment ought to do much to check the over-wide application of the concept of consensual variation of the terms of employment.

It was also argued on behalf of the employer that even if the imposed change of terms was a repudiation of the contract, that repudiation was not accepted by the employee as termination of the contract and so there was no dismissal. The Divisional Court indicated their support for this view.[10] This was a critical point because upon it depended whether there could be dismissal without a complete termination of the employment relationship. The Court of Appeal held that there was a dismissal in spite of continuance of the employment for a short time, because the employee "never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment." [11] Winn L.J. commented that the concept of termination of the contract of employment inherent in the Act was that the contract is brought to an end when it is so broken that no further full performance of its terms will occur.[12] If this appears to represent a departure from general contract principle that a contract may be terminated in response to breach but not by breach,[13] then it is a departure which is well justified by the realities of the employment relationship.

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[6] See *per* Lord Denning at p. 1128H–I.

[7] *Meek* v. *Port of London Authority* [1918] 2 Ch. 96 (Court of Appeal); Pennycuick J. in *Re Mack Trucks Ltd.* [1967] 1 W.L.R. 780, 787: "It must frequently happen in the case of a long period of service with a single employer that employer and employee enter into a whole succession of new contracts, *e.g.*, upon promotion or for other reasons."

[8] *Per* Lord Parker C.J. [1969] I.T.R. 125, 130.

[9] [1969] 3 All E.R. at p. 1127I.

[10] [1968] I.T.R. at p. 124 *per* Lord Parker C.J.; *cf.* Weisbard "Termination of Contracts of Service," (1968) 118 New L.J. 412.

MARK FREEDLAND.

Physical Damage and Consequential Loss

"A plaintiff suing in negligence for damages suffered as a result of an act or omission of a defendant cannot recover if the act or omission did not directly injure, or least threaten directly to injure, the plaintiff's person or property but merely caused consequential loss." [1] Recently there have been two strikingly similar negligence actions [2] brought by plaintiffs who have suffered damage because of a breach of duty of care between the defendant and a third party. (In neither case was the third party involved in the action.) Both plaintiffs were occupiers of factories on an industrial estate, and both were forced to suspend the operation of their manufacturing process because vital public utility supplies had been negligently damaged by the defendants.

In *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* the plaintiffs' water supply was cut off; this happened because the defendants' servant negligently drove their lorry so as to collide with and damage a fire hydrant near the defendants' factory on an industrial estate. Water escaped and the supply of water through the main had to be stopped for some hours. This caused the plaintiffs the loss of a day's work at their factory. The plaintiffs had no property in either the main or the hydrant. In an action by the plaintiffs in negligence it was held by Geoffrey Lane J. at Glamorgan Assizes that the action did not lie because there was no *injuria*, the duty of care owed by the defendants not to damage the hydrant being owed not to the plaintiffs but to the owners of the hydrant that was damaged.

The plaintiffs in *British Celanese Ltd.* v. *A. H. Hunt (Capacitors)*

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[11] *Per* Lord Denning at [1969] 3 All E.R. 1128C.

[12] *Ibid.* at p. 1130B.

[13] *Cf. Michael* v. *Hart & Co.* [1902] 1 K.B. 482; *Heyman* v. *Darwins Ltd.* [1942] A.C. 356; *General Billposting* v. *Atkinson* [1909] A.C. 118; *Hain SS. Co. Ltd.* v. *Tate & Lyle Ltd.* (1936) 41 Com.Cas. 350.

[1] *Weller & Co.* v. *Foot & Mouth Disease Research Institute* [1965] 3 All E.R. 560, 563.

[2] *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* [1968] 2 All E.R. 205 and *British Celanese Ltd.* v. *A. H. Hunt (Capacitors) Ltd.* [1969] 2 All E.R. 1252.

Ltd. brought their action in negligence, nuisance and *Rylands* v. *Fletcher*, but for the purposes of this note I am only concerned with the negligence claim. For the purposes of their business, as manufacturers of electronic components, the defendants brought onto the site, which they occupied on an industrial estate, strips of metal foil several feet long which were light enough to be blown about in the wind. Also on the estate was an electricity sub-station which provided light and power to the factories in the vicinity. The sub-station equipment, including 33-kW bus-bars, stood in the open air. In an incident three and a half years previously there had been an interruption of supply because a strip of metal foil had been blown from the defendant's premises onto the overhead conductor. The electricity board's local engineer wrote them a letter pointing out the consequences of the metal foil coming into contact with the electrical equipment. Thus it was known to the defendants that if a strip of metal foil came into contact with more than one of the bus-bars there was likely to be a flash-over leading to an interruption in electricity supply to the factories on the estate.

A large number of strips of metal foil, which the defendants kept lying in the open air, were blown against the bus-bars one day, causing a power failure. As a result the plaintiffs' machinery came to a stop, materials in certain machines solidified and the machines had to be cleared before production could be restarted. Materials and time were wasted and production lost; the loss of profit being estimated at £9,372. It was held by Lawton J. in the Queen's Bench Division that the defendants would be liable in negligence because they owed the plaintiffs a duty to take reasonable care to prevent the strips of metal foil from blowing onto the bus-bars, and the damage alleged was not too remote.

Seeking to distinguish the earlier decision Lawton J. said: "As I read Geoffrey Lane J.'s judgment he adjudged first that Welsh Plastics Ltd. did not owe Electrochrome Ltd. any duty of care, the element of foresight of injury to their property being absent, and secondly that the damage claimed was too remote anyway."[3] Nevertheless the defendants did foresee financial loss to the plaintiffs; Lane J. commenced his judgment: "*With knowledge* that the damage to this particular hydrant and damage to this particular water main might cause inconvenience or loss to other people on the industrial estate (that knowledge I assume against them for the purposes of argument) the defendants, through their servant, nevertheless damaged the hydrant."[4] Thus despite the fact that the financial damage which they inflicted was foreseeable the defendants nevertheless succeeded in *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* because actual damage to the plaintiffs' property did not occur.

In *Electrochrome Ltd.* v. *Welsh Plastics Ltd.* Lane J. held that

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[3] [1969] 2 All E.R. 1252, 1260.

[4] [1968] 2 All E.R. 205, 206.

"damage was done by a wrongdoer to the *hydrant* in which the plaintiffs had no immediate or reversionary property and no possessory right by reason of any contract, and as a result of that damage the contract which the plaintiffs had with the industrial estate for the supply of *water* became less beneficial."[5] It is suggested that if the words bus-bars and electricity are substituted for hydrant and water in the above sentence, this gives an accurate picture of the status of the plaintiffs in *British Celanese Ltd.* v. *A. H. Hunt Ltd.*

If the words hydrant and lorry could similarly be substituted for bus-bars and metal foil in the following sentence, then there would seem to be no legitimate grounds for distinguishing the two actions: "In this case the plaintiffs had a proprietary interest in the machines which were injuriously affected by the interruption of the power supply resulting directly and without any human intervention, from the fouling of the bus-bar by the metal foil."[6] However, there is one important point of distinction, namely, that in the *British Celanese* case the plaintiffs' machinery was actually damaged as well as there being consequential financial loss for non-production. This actual damage to the plaintiffs' property would appear to be crucial,[7] but there is little to commend the distinction between machinery brought to a halt because it has been damaged by a failure of (electric) power, and machinery halted because it cannot be operated without (water) power. So that, for example, had the plaintiffs in *Electrochrome* suffered damage to their premises or machinery from a burst pipe, on the above analysis, they too would have recovered damages for all their losses; this is both anomalous and crude.

Lord Devlin, in *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.*,[8] indicates the irrationality of this distinction in the sphere of giving negligent advice.

> "The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor commonsense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy . . . I am bound to say, my Lords, that I think this to be nonsense."

A possible amelioration of the situation is to be found in the notion of threatened damage, that is, that a duty of care relationship exists wherever the defendant's acts "threaten directly to

[5] [1968] 2 All E.R. 205, 207.

[6] [1969] 2 All E.R. 1252, 1260.

[7] "... and the unsuccessful plaintiff is left with the cold comfort that it would have been better for him had a chattel of his been physically damaged as well, if only to the extent of £5." M. A. Millner, *Negligence in Modern Law*, p. 63.

[8] [1963] 2 All E.R. 575.

injure the plaintiff's person or property,”[9] as this indicates sufficient proximity. The court could then consider, from the viewpoint of remoteness of damage, whether the consequential financial loss would be recoverable if actual damage was inflicted. Then, so long as the plaintiff was *within the same ambit of risk of physical injury*, the court could award him damages for his consequential loss regardless of whether or not actual damage occurred. On this argument Electrochrome Ltd. would have recovered as presumably the sudden cutting off of the water supply carries a similar inherent risk of damage to machinery as does a power cut.[10]

Although policy dictates that a line must be drawn if there is not to be a superfluity of claims, this modest extension seems desirable. The Court of Appeal will have the opportunity to clarify the law as leave to appeal has been granted in *British Celanese Ltd.* v. *A. H. Hunt Ltd.* Meanwhile practitioners would be well advised to include within their statements of claim a claim for damage to property, however small, as this may make the crucial difference between success and failure.

MARY HAYES.

STATEHOOD AND RECOGNITION

IN the Chancery case of *Re Al Fin Corporation's Patent* [1] Graham J. was confronted with the issue, familiar to international lawyers, as to when is an entity a “ state ”? And in particular is this issue dependent upon the factor of recognition?

The facts of this case, in so far as they raised the issue of statehood, were that the applicants were the owners of British letters patent which had been granted in 1953. In 1966 they applied to the Comptroller General of Patents for an extension of the terms of the letters patent for five years under section 24 (1) of the Patents Act 1949 on the grounds of war loss owing to “ hostilities between His late Majesty and the Government of the Democratic People's Republic of Korea during the period of 25th June 1950 and 27th July 1953.” Section 24 (1) allowed the Comptroller to grant such extension where the applicants had suffered loss by reason of hostilities between this country “ and any foreign state.” Therefore the applicants in this case were arguing that the Democratic People's Republic of Korea (which for convenience will be referred to as North Korea) came within the definition of “ any foreign state ” for the purposes of the statute.

The issue was referred to the Chancery Division, by agreement of the parties, for a declaration on the true construction of section 24.

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[9] *Weller & Co.* v. *Foot & Mouth Disease Research Institute* [1965] 3 All E.R. 560, 563.

[10] Counsel, faced with similar circumstances, might profitably be able to argue that “ injury ” to property could include rendering it temporarily useless.

[1] [1969] 3 All E.R. 396.

As is the practice in such cases involving issues of statehood and recognition the parties obtained a certificate from the Foreign Office dated July 8, 1968 in which it was stated that during the relevant period, *i.e.*, the period of hostilities (to be referred to as the Korean War), "His/Her Majesty's Government did not recognise the existence of an independent sovereign state in the area of Korea north of the 38th parallel either *de facto* or *de jure*." However, H.M. Government "are aware that (during the Korean War) there were certain authorities styling themselves 'The Government of the Democratic People's Republic of Korea' exercising control over the above-mentioned area."

On the basis of the Foreign Office Certificate counsel for the Comptroller argued that North Korea, not being recognised by H.M. Government, was not a "state" within the ambit of section 24 (1). As Graham J. put it,[2] the Comptroller was submitting that the subsection must be read "as if the words 'recognised as such by Her Majesty' were included after the words 'any foreign state'." Counsel for the applicants, on the other hand, argued that the definition of "state" should not be so limited as to depend upon recognition. Instead it should depend upon the practical consideration as to whether there was a government in effective control over a defined area of territory irrespective of recognition. He pointed out that there have been recent examples of governments, including the British Government, withholding recognition, "for political or other reasons,"[3] long after the unrecognised state or government has clearly demonstrated its stability and control. Indeed the certificate of the executive in this case made it clear that H.M. Government had taken cognisance of the fact that there had long been a government, albeit unrecognised, exercising control over North Korea.

In effect the court was faced with a confrontation between the constitutive theory of recognition argued by the Comptroller, and the declaratory or evidentiary theory argued by the applicants. According to the constitutive theory a state or government only comes into being when it has been recognised by other states. It is the act of recognition itself which constitutes a new state or government and which confers status in international law to such state or government. According to Graham J., the Comptroller was arguing that ". . . if there is no formal recognition, there is no government and no State whose laws can be enquired into for the purpose of establishing whether a person is the subject of such a state."[4] On the other hand according to the declaratory theory whether a state or government exists depends upon a state of affairs irrespective of recognition, *i.e.*, whether there is a government in effective control over a defined area of territory. On this analysis an act of recognition is merely a formal acknowledgment of this state of affairs. To put it another way recognition would be evidence of statehood or of the effectiveness of a government but it would not itself be by any means conclusive of the issue. According to Graham J.'s summary of the arguments on this issue, of the applicants "... if the facts were sufficient to show that there was a government in effective control over a defined area of territory, then this should qualify as a State within the section whether in fact recognition by the Foreign Office had been made or not."[5]

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[2] *Ibid.* at p. 402.

[3] *Ibid.* at p. 403.

[4] *Ibid.* at p. 403. The reference to whether a person is the subject of such a state was derived from s. 24 (8) of the Patents Act 1949. This subsection provides that no order can be made under s. 24 on the application of a "subject of such a foreign state as is mentioned in subsection (1). . . ." Counsel for the comptroller argued that s. 24 (8) makes it clear that the foreign state is one which has subjects, and that in English law a person cannot be the subject of an unrecognised foreign state.

In the event Graham J. preferred the arguments of the applicants, and therefore this case provides yet another defeat for the protagonists of the constitutive theory. "I have no hesitation" said Graham J.,[6] "in holding that the words 'any foreign state,' although of course they include a foreign state, which has been given Foreign Office recognition, are not limited thereto. They must at any rate include a sufficiently defined area of territory over which a government had effective control." North Korea was therefore a foreign state within the meaning of section 24.

It is submitted that the decision in this case recognises the reality of a situation in which recognition is increasingly given or withheld for political reasons rather than on the grounds of effectiveness and stability of a state or government. Despite the British Government's having on some occasions stated the desirability of recognition being regarded as a legal duty in the case of entities fulfilling the factual criteria of statehood or government,[7] and despite its general compliance with this objective,[8] the example of the non-recognition of North Korea illustrates that even this stated ideal can be overriden by paramount political factors. In fact if the British Government had recognised North Korea as a state such an act would have been in contravention of Resolution 195 (III) of the General Assembly of the United Nations, in 1948, to which

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[5] [1969] 3 All E.R. 396, at p. 403.

[6] *Ibid.* at p. 404.

[7] *e.g.*, in its observations to the United Nations in 1948 on the Panama Draft Declaration on the Rights and Duties of States the British Government stated its agreement with Article 9 of the Panama Draft that, "the recognition and non-recognition of States is a matter of legal duty and not of policy."

[8] *e.g.*, Great Britain was the second non-communist state (after India) to recognise (on January 6, 1950) the People's Government of China. In answer to opposition criticism of such recognition, Mr. Ernest Davies, then Under Secretary of State for Foreign Affairs, said that: "In recognising the People's Government of China we considered that we were facing the facts. We were accepting the fact that the People's Government of China was the effective Government of the Country." (H. of C. Deb., November 1, 1950, Vol. 480. col. 241).

Great Britain was an affirmative party.[9] This Resolution, after declaring that the Government of South Korea had been elected as a result of "elections which were a valid expression of the free will of the electorate of that part of Korea . . . ,"[10] and that it was the only lawful government in Korea, called upon member states of the U.N. to refrain from any acts "derogatory to the results achieved and to be achieved by the United Nations in bringing about the complete independence and unity of Korea."[11]

C. J. F. KIDD.

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[9] For text of Resolution see *Yearbook of the United Nations*, 1948–49, p. 290.

[10] Para. 2 of the Resolution.

[11] Para. 8 of the Resolution.

REVIEWS

PRECEDENT IN ENGLISH LAW AND OTHER ESSAYS. By JAMES LOUIS MONTROSE. Edited by H. G. HANBURY. [Dublin: the Irish University Press. 1968. v and 368 pp. 68s.]

THE late Professor Montrose's friends at Queen's University, Belfast, deserve the gratitude of lawyers generally, and particularly of law students and teachers, for having made possible the publication in this handsome volume of a well-chosen selection from his writings—particularly from his contributions to periodical literature where they were spread over a very wide field, and would to a substantial extent have been inevitably lost but for this admirable salvage operation. Having mentioned the appearance of the book I will add that it is splendidly printed, and sells at a very moderate price for such a volume. The Irish University Press are certainly to be congratulated on the production, though one could wish that the misprints were fewer, and even more that an index had been provided.

The selection of articles to be reprinted was made and the editing done by Professor H. G. Hanbury who is very much to be thanked for his work. At the end of the volume a useful list of Montrose's writings is appended which adds up to no less than ninety-one items; of which eighteen appeared in this *Review* to which Montrose was a contributor from very early days (1938). While many of these were shortish book reviews and case notes the number of substantial articles listed, most of them of high quality, is large, and choice of one rather than another must often have been difficult. Students who wish to avail themselves further of Montrose's thought on legal matters will at any rate know where to look for it.

Montrose was a remarkable man. Something about his career will be found in Professor Hanbury's Introduction which is far from the perfunctory couple of pages or so which is so often provided on this kind of occasion. He makes indeed a useful, if too flattering, estimation of the Montrose *oeuvre*. Having been largely responsible for building up two university law schools one might think of him as being primarily an administrator; indeed his abilities in that direction were shown in his work for the Society of Public Teachers of Law of which he was a successful President: possibly his most valuable effort in that organisation was in connection with law libraries. Those of us who remember the dismal condition of these before the 1939–45 War will always feel grateful for the work he did there. Parallel to the S.P.T.L. and largely contemporaneous was the Association of University Teachers where he was a leading member for many years, chairman of important sub-committees, and also President.

But he was far from being just an administrator in the law schools which he ran. The testimony of his students shows that he was a particularly successful teacher: indeed Professor Hanbury regards him as having been a teacher of genius. His deep interest in "the teaching" of law is continually evident in these essays, and this in some ways is their chief value: no good law student could fail to profit from a careful study of the volume.

With the heavy load on his shoulders above indicated it is surprising that his literary output was so large, and it is no doubt significant that the list of writings shows that more than half of his output, and that much the most important part, came from the last ten years of his life. He left his beloved Queen's University, Belfast, where he was dean for some thirty years, in 1964, and in circumstances which caused him emotional anguish, though this did not affect the quality of his writing, and he spent the few years left to him teaching in Berlin, Singapore and Auckland, New Zealand. Even this peripatetic life did not slow down his literary activity and no less than three pieces in the present collection date from this period. There is perhaps a feeling of haste, even of breathlessness, about sections of them, but no appreciable falling off in quality.

Of the eighteen pieces presented in this collection the majority should, I suppose, be classified under the heading Jurisprudence, though as "straight" Jurisprudence only three or four would qualify—some of the wider ranging essays contain valuable jurisprudential discourse, as "Return to Austin's College." Montrose was very interested in what may be called legal logic, and therefore in Austin; and both in that address and in "The Scope of Jurisprudence" has interesting things to say about him. But as a teacher in the Belfast Law School located among a practical and intensely pragmatical people he was perhaps more concerned with peripheral jurisprudential matters such as the interrelated subjects of precedent and *ratio decidendi*. In the revival of interest in these topics which in the case of the doctrine of precedent has of course led to a fundamental change in the conventional procedure, he played an important part. Indeed his article "The *Ratio Decidendi* of a Case" (20 M.L.R. 587; not reprinted in this collection, the earlier and slighter "*Ratio Decidendi* and the House of Lords" from the same volume having been preferred) is a milestone in a really fruitful controversy on the subject. And Professor Hanbury has of course selected the article on Precedent as the title for the volume itself. The choosing of a title for a miscellaneous collection of essays is notoriously difficult and the attempt is often made to overcome it by taking that of one of the more important pieces brought together. Here I think that Professor Hanbury made a mistake. This article was in fact a review of the book with that title by Professor Cross. It is a somewhat critical discussion of some of the views expressed in that volume, and does not really open up the subject in the general way one would have expected of Montrose. It might well give the prospective reader a too limited view of what he was buying and neither as a title nor in substance does it convey the versatility and width of scholarship evident in the later essays. Personally I would have preferred the title "The Nature of Juristic Discourse" which is that of the last essay. In point of fact two of the other articles are mainly concerned with precedent: they might well have been grouped together when they would have provided a more coherent treatment of the subject.

In his earlier years commercial law was one of Montrose's main interests, particularly agency and his principal articles before 1939 were devoted to that topic. Indeed it is probable that most of us first heard of him through his *Law Quarterly Review* article of 1934 (50 L.Q.R. 224) "The Apparent Authority of an Agent of a Company" which has been quoted more than once in the courts and remains one of his best efforts, though so many important decisions have been given on this subject in the intervening years that one can well understand Professor Hanbury's decision not to include it here. The same title was used again in an article of 1965 (reprinted in this volume) evidently intended to bring the earlier one up to date, though it is only passingly mentioned in a footnote: the piece included is noteworthy chiefly for a masterly analysis of Lord Diplock's judgment in the *Buckhurst* case. Two other articles on Agency are included which together with pieces on the Cheques Act 1957 and one on Sale of Goods show Professor Hanbury's high estimate of Montrose's ability as a commercial lawyer: though it is fair to say that the sales article is concerned with the familiar topic of whether articles displayed in a shop are offered for sale. And further on commercial contract there is "Some Problems about Fundamental Terms," in which the author's flair for linguistic analysis is ably used. These articles which are grouped together give the volume quite a flavour of commercial law. The longish article on "Basic Concepts of the Law of Evidence" provides further proof of his interest in practical problems. It is certainly one of the most characteristic in the collection, showing the author's wide knowledge, his grasp of practical problems, his ability to relate them to legal principles, and his facility in using non-legal material to buttress an argument.

Montrose had a rather restless determination to keep up with everything which was going on: indeed if he had not spread himself so widely his work would no doubt have reached an even higher quality than that which he in fact achieved. The important post-war movement in our law schools for the study of comparative law attracted him: and while it cannot be said that he became a comparative lawyer he was always at home in international gatherings. Symptomatic of this was the part he played in organising the visit of the Society of Public Teachers of Law to the U.S.A. for a joint conference with their American brothers. It is not surprising therefore to find him at Hamburg acting as rapporteur at a Congress of the International Academy of International Law. Two of his rapports, the one on General Principles of Law and the other on the Use of Legal Categories are given here—short, clear and stimulating, they can be regarded as models of their kind.

Nevertheless Montrose was at the end of the day primarily a teacher, as I hope I have already made clear, and throughout this volume it is always the teacher that we see at work. In the best academic tradition he teaches not only his students in the class room, but also the profession as a whole, perhaps particularly the judiciary. This is nowhere seen better than in the final and longest of these essays on the "Nature of Juristic Discourse" which he apparently, and with reason, regarded as his best work. This article begins with the statement "this paper constitutes an inquiry into the kinds of activities which are being carried out in university faculties of law or ought to be carried out"—something of the sort might be said of the whole volume. The opening section takes the form of a General Discussion of Juristic Discourse. The author then turns to a well known case *Broom* v. *Morgan* [1] and describes and analyses the discourse about it of several academic writers and one court, a Court of Appeal. In the end the discourse is mainly that of Montrose and of Montrose at his best. In the final part "Law in Relation to Logic, Social Welfare, and Justice" he manages in characteristic fashion to indicate the philosophy on which his life work was based, and yet never loses his grip on the discourse of the academic writers and judges which he is concerned to discuss. The philosophic streak in Montrose was never far from the surface: and unlike the majority of us who dabble in jurisprudence he managed to move with confidence in this somewhat rarefied atmosphere, because, if his head was often in the clouds, his feet were usually firmly on the ground.

CHORLEY.

PRECEDENT IN ENGLISH LAW. By RUPERT CROSS. Second Edition. [Oxford: The University Press, Clarendon Law Series. 1968. 238 pp. (with index). 80s. net.]

PROFESSOR Cross intends this invaluable book for both law students and laymen wishing to gain a knowledge of case law. It is not, however, a mere introductory work, any more than is that other jurisprudential work in the Clarendon Series, Hart's *Concept of Law*. Apart from C. K. Allen's *Law in the Making*, Professor Cross's book is the only systematic and comprehensive study of the English doctrine of precedent to be published and any lawyer will benefit from it. The account is clear and readable so a layman should be able to follow it, provided he is intelligent and prepared to think hard, for the ideas discussed are complex. Explanations of the doctrine of precedent, intended for students or laymen, are complicated by the need to cite a wide variety of illustrative cases covering all aspects of law from affiliation to wrecks. Often the full flavour of a particular decision cannot be appreciated without a fair knowledge of the field of law involved. Should the facts of the case be given in too little detail the account becomes dull, unconvincing and often incomprehensible. On the other hand, a treatise on the doctrine of precedent cannot be allowed to become a dissertation on the various branches of substantive law. Professor Cross's accounts of the cases generally strike the happy medium between these extremes, though I suspect that the non-lawyer might have difficulty in grasping the issue in *R.* v. *Millis* (1844) and *High Trees House* (1947).

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[1] [1953] 1 All E.R. 849.

Eight years separate the first and second editions of this book and events have necessitated a change in attitude. In 1960 Professor Cross correctly stated that the English doctrine of precedent was more rigid than ever before. Now there are "pronounced signs of relaxation," culminating in the House of Lords Practice Statement of 1966. In 1960 he said that codification was not a live issue in this country, but in 1968 parts of English law "are likely to be codified in the near future." Such cases as *Scruttons* v. *Midland Silicones* (1962), the *Wagon Mound* (1961), *Hedley Byrne* v. *Heller* (1964), *Chaplin* v. *Boys* (1968), *Conway* v. *Rimmer* (1968) are included, though a little more discussion of the implications of the 1966 Practice Statement and its relationship with the decision in *Conway* v. *Rimmer* would have been welcome.

The changes of the past eight years have not led to a change in the basic approach of the book. Professor Cross's aim is the elucidation of the legal concept of *stare decisis* and he therefore describes his work as an "essay in analytical jurisprudence." So illusive has the doctrine of precedent proved to be that some, such as the American Realists, have concluded that it is in fact an illusion and that the attempt to distinguish between *ratio decidendi* and *obiter dictum* is a "wild goose chase" (p. 47). Study what the judges actually do and not what they say they do is the basic tenet of this school of thought. Professor Cross is not of this persuasion but neither is he an old-fashioned believer in "mechanical jurisprudence." He recognises that often a judge will make his decision first and then proceed to consider the authorities, but says that "the significance of the place of reasoning by analogy is not greatly affected by the fact that it succeeds the conclusion which it justifies" provided that the judge is prepared to change his decision if his study of the authorities requires it (p. 49). There is no evidence, he says, that this is not current judicial practice in England, and the first half of this book is devoted to detailed study of this practice. Nevertheless some of his conclusions show a scepticism that the realists would applaud. After extended consideration of the nature of the distinction between *ratio decidendi* and *obiter dictum*, and in particular a discussion on whether or not a decision in favour of an unsuccessful party can ever be considered part of the *ratio*, such as the decision on responsibility for advice in *Hedley Byrne* v. *Heller* (1964), Professor Cross comments that "we have plainly reached a point at which the distinction between *ratio decidendi* and *obiter dictum* is meaningless in practice." Later, however, he warns that the reader must be on his guard not to take up the position that because there are some situations in which this distinction is meaningless, the distinction is not an important part of the doctrine of precedent (pp. 85–86). Professor Cross's own description of the *ratio* of a case can obviously include a considered judicial pronouncement on a hypothetical or unproven fact: "The *ratio decidendi* of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury" (p. 77).

This description Cross describes as "tolerably accurate" but it is not intended as a formula for determining the *ratio* of any case. Obviously it cannot be used as an infallible method of determining the *rationes* of such difficult cases as *High Trees House* or *Hedley Byrne* v. *Heller*. Professor Cross concludes his detailed study of the operation of *stare decisis* with a list of ten possible exceptions to it. The study thus makes clear the problems involved in the analysis of the doctrine and shows why the ideas of the realists are so attractive. This reader is also sometimes left with the feeling that inherent in the very attempt to analyse the concept of *stare decisis* is the danger that the doctrine will seem to have greater formality than it in fact possesses. From his own specialised knowledge, every lawyer can cite examples of judicial techniques which appear to be in conflict with correct practice. For example, there are a number of cases on cruelty in divorce law, decided since the House of Lords decision in *Gollins* v. *Gollins* (1964) and *Williams* v. *Williams* (1964) in which one or both of these cases are not considered. Are these cases *per incuriam* or distinguishable on the facts, or neither? No judicial pronouncement has yet resolved the problem.

The second section of this book consists of an examination of the relationship of case law with other sources of law such as custom and legislation, an examination of the nature of judicial reasoning and a consideration of case law and the general problem of defining law. In this section the book is, in fact as well as in intention, more of an introductory work than is the first half. Nevertheless the issues are clearly and succinctly put forward and every student of jurisprudence should read it, especially the chapter on judicial reasoning, a subject in which obscurity has for too long been thought inseparable from profundity. The section on the interpretation of statutes has been severely pruned in this second edition, the description of the various "rules" having been omitted. However, Cross has some interesting views on the status of statutory rules in our legal system for he feels that it is arguable that the English courts have accepted "for a considerable time" Pound's idea that a legislative innovation should be received into the full body of the law and be reasoned from by analogy in the same way as a rule of common law. Cross gives examples of where this has happened such as the use made by equity of the Statute of Limitations. This idea is sufficiently contrary to the received notion that the English courts take a restrictive attitude to statutory rules to make this reviewer wish that he had given the matter more extended treatment. One might also wish that he had written more on the judicial fate of such codifying statutes as now exist in England as codes will now become increasingly important. Perhaps what I really wish is that Professor Cross would write an equally stimulating and readable book on legislation in English law.

Finally, it is a pleasure to say that at a mere thirty shillings this book is, as are the others in the Clarendon Series, very good value.

J. LEVIN.

DOUBLE JEOPARDY. By MARTIN L. FRIEDLAND. [Clarendon Press: Oxford University Press. 1969. xxviii and 489 pp. (inc. index) 90s.]

THE phrase "double jeopardy" has an American ring, but it is a convenient one to comprehend the various rules of English law which prevent harassment of an accused. Professor Friedland's book is primarily on the English law but there is ample reference to U.S., Canadian and other Commonwealth authority.

"The history of the rule against double jeopardy is the history of criminal procedure," says Professor Friedland, and to a large extent this claim is justified throughout the book. It is remarkable how much this rule has shaped and been shaped by other rules of criminal procedure. But the emphasis on the historical evolution of the rule, though fascinating and illuminating, is often at the expense of adequate elaboration of the scope of the modern rule and a proper policy analysis of its application. The different rationales of the pleas of *autrefois acquit* and *autrefois convict* are only hinted at.

The first part of the book deals with termination of proceedings before verdict where English law, in Professor Friedland's submission, provides too little protection against an improper termination in that the accused will not be able to use the plea of *autrefois acquit* in the event of reprosecution. However, there are serious difficulties with the U.S. view that jeopardy attaches at a time before verdict.

In the second part of the book Professor Friedland deals with protection afforded to an accused subsequently charged with other offences. He would restrict the special pleas narrowly to cases where the accused is charged with an offence for which he has previously been in peril, and instead what he calls the rule-preventing the prosecution splitting their case would form the main barrier against harassment. In this he is surely right. As he says, English law provides too much "vertical" protection and not enough "horizontal" protection. The accused is perhaps more than adequately protected against being recharged with the same offence, but not sufficiently against being recharged with other offences arising out of the same fact situation. The answer lies not in extending the scope of the special pleas to cover the same act rather than the same offence, nor in the development of the modern concept of issue estoppel, but in compelling the Crown in the absence of good reason to put the accused on trial for all offences arising out of the fact situation. Professor Friedland discusses the historical rules which prevented the development of a one-trial policy, but it would seem now that with the abolition of the distinction between felonies and misdemeanours, and on the authority of *Connelly* v. *D.P.P.* [1964] A.C. 1254, where it was said that the judge had a discretion to stay vexatious proceedings, we are now on the threshold of discovering the rule against splitting a case. This rule would, as Professor Friedland realises, have to be qualified by other factors such as the possible prejudice to the accused where the evidence on one charge is inadmissible on others, and the danger that a single trial of all issues might impose an undue strain on the efficient functioning of the jury system. However, the overloading of indictments with numerous counts would be restrained by another rule which is dealt with in this part, the rule against multiple convictions. A recent example of this rule can be found in *Harris* [1969] 1 W.L.R. 754 where the Court of Appeal held that an accused convicted of buggery ought not to have been convicted in addition of indecent assault arising out of the same act.

The next part of the book deals with the problem of appeals and new trials. Professor Friedland gathers all the arguments for and against and analyses them brilliantly. It is his belief that there is no sound policy or historical reason to deny an appeal court the power to order a retrial following the quashing of a conviction. There is here a particularly illuminating discussion of the difficult concept of *venire de novo*.

Finally there are chapters on double jeopardy problems in relation to domestic tribunals, foreign courts and the federal structure.

In these days of concise college texts it is indeed refreshing to read a new and scholarly book on a hitherto unexamined corner of the common law. Professor Friedland's book is undoubtedly a most welcome addition to the somewhat scanty jurisprudence of criminal procedure.

MICHAEL NEWARK.

THE MAKING OF A CRIMINAL. By PATRICIA ELTON MAYO. [London: WEIDENFELD & NICOLSON. 1969. 147 pp. (including index and notes). 42s. net.]

The Making of a Criminal is the latest monograph to appear in the series on *The Nature of Human Society*. It is a welcome book, the moral of which is that if complacency is the order of the day, reflection and action are needed. The value of the book arises from the fact that the author has viewed the problem of delinquency/criminology from a comparative standpoint. The two areas examined, Marseilles in France and Wrexham in Wales, appear at first sight quite dissimilar, but since the study is concerned exclusively with a housing estate in the respective areas the similarity in environment and size of the communities is met. What value can be derived from such a study? As the author states, and this is the disquieting feature of the work in the reviewer's opinion, "both are new housing estates, and both produce a considerably higher than average number of adolescent and young adult offenders, some of whom are violent. Housing estates are a development here to stay, . . . The study is therefore of relevance to the future rather than the past."

Section I of the book traces in general terms the history of the study of criminology and in the process the author draws attention to certain main authorities in the field, including Durkheim, Lombroso, Sutherland, Freud and the Gluecks, and evaluates their respective contributions to the study of crime and its causes. This provides the reader with a "bird's-eye" view of the methods employed and the contributions made by these pioneers to the study of criminology. As a consequence the author is able to indicate the particular way in which the present research project differs from those undertaken in the past: an "international comparison carried out by the same research worker actually in the field." This first section is an essential one to a proper understanding of the detailed findings of the later sections: it is informative and occasionally illuminating, an example of which (at p. 27) is seen from the contrasting attitudes to crime and its causes by the prison service in France with that of its English counterpart.

Sections II and III of the book are concerned with the selected housing estates in Marseilles and Wrexham respectively. Initially the author asks whether each estate can be regarded as a delinquency area and data are provided both as to the incidence of crime and the types of offence committed within the areas to establish this fact. These sections are the central features of the study and involve the author in a detailed account and evaluation of the conditions obtaining in each, a brief history of each area and, where relevant, comparisons and contrasts are drawn between the two. The methodology adopted, in no way original, comprises an examination of a number of factors which may or may not contribute to each area's problems: the racial origins of the area's inhabitants; educational possibilities and attitudes; employment prospects; case histories of certain delinquents; family structure, amusements and leisure pursuits; civic "belonging" and the delinquent sub-culture, and finally the autobiographies of selected delinquents.

Arising from this, certain interesting aspects of the comparisons made between the two housing estates require repetition and comment. In regard to the educational attitudes of the two nations (France and Wales) it is said (at p. 51) that both have a high respect and admiration for intellect and learning: the Marseillaise typified this attitude, but not the people of Wrexham. Wrexham is a border town, a "limbo" area, having a quite distinct "culture." In the discussion on employment (at pp. 53, 54) the author remarks that at the time the research was undertaken, there was considerable unemployment in Marseilles (to which the reasons for delinquency were primarily attributed) whereas in Wrexham it was a period of full employment! The conclusion reached as a consequence was that unemployment was not itself the cause (although an important factor nevertheless), but rather the *unemployability* of the residents of both areas, due in no small measure to the criminal traditions of the particular communities.

The book is certainly a disquieting one. It highlights a dilemma of the modern society. With the ever increasing tendency to re-house the "slum-dwellers" in the housing estates of the modern cities the problem of the delinquency area emerges anew, in a different yet more acute form. What kind of action is required to redress the balance? The author suggests two not unrelated methods (at pp. 68 and 187): (a) the need to establish on a sound footing the deployment of the "detached social worker" and (b) the establishment of a club within each community whereby exclusive control would be reposed in the hands of the local inhabitants, delinquents and ex-delinquents, to manage and conduct its affairs. In this way it is hoped that a sense of responsibility and purpose, a civic "belonging" as it were, would be created within the community. The author is to be congratulated on providing the criminologist with a welcome addition to his library.

BERNARD DAVIES.

CONSTITUTIONAL LAW IN NORTHERN IRELAND: A STUDY IN REGIONAL GOVERNMENT. By HARRY CALVERT. [Stevens and Sons Ltd. and Northern Ireland Legal Quarterly Inc. 1968. xxi and 400 pp. £5 0s. 0d.]

CURRENT English political concern with the operation of Northern Ireland governmental institutions dates from about 1965, yet at that time there must have been few politicians and fewer lawyers who really knew much about the Northern Ireland Constitution. Indeed, any reference to "the Constitution" was usually taken to mean a defence of, or attack upon "the Border," and while that kind of emotional association persisted discussion of the constitution was foredoomed to sterility. After reading Mr. Calvert's book, however, no one can any longer pretend that the Constitution and the Border are synonymous. In this learned and detailed book, divided into two parts (United Kingdom Relations pp. 10-110, and Internal Matters pp. 111-390) he has effectively shown that the Northern Ireland Constitution, based as it is on the Government of Ireland Act 1920 and consequent amendments, covers a wide field and is eminently suitable to rational discussion.

Faced with a constitution based on a constitutional statute, and in existence for forty-seven years (the book states the law as it was on June 1, 1967), without significant amendments, Mr. Calvert has chosen to look at the internal aspects of the constitution, the bulk of the book, very much through the eyes of a constitutional lawyer, conscious of the fact that a court has the last word on matters of legislative and executive competence. Much of the second part of the book is taken up with an immensely detailed and sophisticated analysis of the leading cases on the Northern Ireland Constitution, interwoven with a general discussion of some principles of constitutional interpretation. Henceforth no lawyer concerned with the Northern Ireland Constitution should be short of arguments to address to the courts on the meaning of the constitution and the implications to be drawn from the past cases. This job needed to be done and it has been done well.

But is this the only or indeed the best perspective from which to examine a constitution, particularly one whose operation, even as Mr. Calvert wrote, was being subjected to severe scrutiny and strain? Should there not be some consideration, not only of how the constitution appears in the rarified atmosphere of a constitutional court, but how it has evolved as a living law over a period of years, and how it operates in practice now? I confess that I felt that there was too little of this approach, and that this absence mars Mr. Calvert's book. In the first Part where there are few cases to discuss, some references are made to practice, and likewise in the second Part, in the chapters on Parliament and Ministerial Government, we are given some interesting facts and figures about the legislature which help explain its lack of effectiveness as a check on the Northern Ireland executive, but the overall impression I was left with was of a constitution far removed from the realities of governmental power and the day-to-day operations of the various arms of the executive.

What is the reason for this? I think it lies in Mr. Calvert's concern that his work should be and be seen to be in accordance with "the strictest standards of legal objectivity" (Preface, p. 6) a work of law not politics (see p. 281 for a good illustration of this distinction in discussing Sunday observance legislation). One can well understand why in the climate of Northern Ireland it was necessary to stress that a book on the constitution was to be scrupulously legal and impartial, but it seems that legal objectivity has been carried to the point where certain important and fundamental questions about the Northern Ireland Constitution have not been considered because to answer them would have required a mixture of law and politics. Some of these questions would be: why has the Westminster Model developed in Northern Ireland so differently from the rest of the United Kingdom; what is the efficacy of constitutional guarantees of human rights in a polity where one party dominates the executive and the legislature; are there any "gaps" in the constitution which have allowed the present situation to arise—*e.g.*, would a system of reserved seats for minorities in the legislature, or a Police Service Commission, separate from the executive, have helped to protect minorities any better (the police incidentally are not given any extended treatment); how can a system of preventive detention be reconciled with the kind of liberal democracy that the British parliamentary system of government implies? I do not think that these are questions only for the political philosopher; it is pre-eminently the business of a lawyer to be worried about the failings of the constitutional law of his own state and to speculate about its causes and cures. He cannot or should not retire to the court and its canons of constitutional construction under the plea of legal objectivity, leaving the business of reform to others, yet this seems to be the message of Mr. Calvert's book. It is a message with which I profoundly disagree.

PATRICK MCAUSLAN.

THE VIETNAM WAR AND INTERNATIONAL LAW. (Sponsored by the American Society of International Law.) Edited by RICHARD A. FALK. [Princeton, New Jersey: Princeton University Press. 1968. ix and 688 pp. (including documents and index). Bound £7 2s. 6d. Paperback £1 15s. 0d. net.]

LAW AND VIETNAM. By ROGER H. HULL and JOHN C. NOVOGROD. Foreword by MYRES S. MCDOUGAL. [Dobbs Ferry, New York: Oceana Publications Inc. 1968. xi and 211 pp. (including bibliography and index). $7.50.]

THESE two volumes are among the number of significant items concerned with the legal aspects of the Vietnam War and published in the United States. They may be compared with another American production: *Vietnam and International Law*, published by the Lawyers Committee On American Policy Towards Vietnam (O'Hare Books, 1967). Some other comparisons occur. The relatively small community of British international lawyers displays extreme reticence in the face of contemporary crises. The Suez crisis merely produced some interesting letters to *The Times*, including one from Lord McNair about the nationalisation of the Canal Company. This letter promised a more detailed *exposé* which either was not written or was not published. Soviet international lawyers produce literature on contemporary themes very readily but the approach is too often journalistic and they always accept official factual and political premises. The American publications under review are partisan, in the sense that most of the individual contributors clearly work from particular policy bases, yet the writers deserve credit for a generally high level of treatment and controversy.

The substantial volume edited by Professor Falk consists of readings and documents brought together under the auspices of the Civil War Panel of the American Society of International Law. In the introduction it is remarked that: "There is too much that remains, and may always remain, controversial with regard to a legal appraisal of the United States' involvement in the Vietnam war to allow one interpretation to be singled out as authoritative by a Panel that seeks to be representative of American international lawyers as a whole." The Panel has launched this and other projects, including a series of case studies, as a means of achieving its basic objective, which is "to attempt a reinterpretation of the international law of civil war adequate to the needs of current international life."

Whatever the outcome of this ambitious programme as a whole, the present volume must surely be the best study of the issues in the Vietnam War to appear in English. The contributions overlap inevitably but together they present an ample view of its factual, political, moral and legal facets, but with three exceptions. First, there is almost no mention (but see p. 229) of the problems relating to methods of warfare. Secondly, there is no reference by any of the contributors to evidence of South Vietnamese and American clandestine operations against North Vietnam commencing in 1959, with the object, among others, of organising guerrilla warfare (proceedings of a Senate sub-committee reported in *The Times* April 20, 1968). Thirdly, there is no discussion of attempts to provoke China: certain American operations in the area have had little reference to the war itself. Most of the contributions are reprints but they go together very well. The most sober, toughly argued and distinguished pieces, especially for the lawyers, are those by Roger Fisher, Wolfgang Friedmann, Eliot D. Hawkins, Daniel D. Partan, John Norton Moore, Quincy Wright and the editor. In particular, the controversies between Moore and Friedmann, and Falk and Moore are fruitful, dealing with the critical issues of law and fact. Falk and Friedmann provide the best sense and greatest consistency while Moore provides stimulating opposition. The volume includes pieces by Dean Rusk and U Thant and there is an immensely valuable set of documentary appendices. From the technical point of view the volume provides much material of quality on intervention in civil war, with particular reference to the right of individual and collective self-defence (see Article 51 of the Charter of the United Nations), and the problems of legal personality of the two halves of Vietnam. The contributors as a whole are less successful in their treatment of the legal consequences of the Geneva Agreements and Declaration themselves, which is a pity as these instruments have been the subject of many misconceptions.

The study by Hull and Novogrod covers the difficult ground in a vigorous and readable treatment in which the legal aspects are given systematic and comprehensive analysis. A large number of references to documents and relevant legal literature is provided. The book is rewarding to read although there are some points on which at least some readers would have substantial reservations. On factual matters, the authors tend to identify the N.L.F. with the North Vietnamese Government and consequently ignore the political strength of the political predecessor of the N.L.F., the Vietminh, throughout Vietnam, and including the delta, before 1954. On legal matters, the treatment of the Geneva Agreements and Declaration is very unsound and elementary principles of treaty law are ignored. Thus it is said (at p. 48): "Indeed, the legal validity of the entire Declaration is questionable, since the Declaration was left unsigned." For this proposition the authority of Bernard Fall, who was a good reporter but not a lawyer, is invoked. In fact the parties did not make signature a condition of validity. It is important to bear in mind the legal status accorded to the Final Declaration and the Geneva Agreements by official United States opinion expressed, for example, in a Department of State Legal Memorandum of March 4, 1966 (printed in the first volume reviewed, p. 588). The Americans' legal case rests to a considerable extent on the *validity* of the Geneva Agreements and their main argument is that material breach by the North of the relevant Agreement justifies countermoves by the South and its allies. The worst problems are, of course, factual: the question of which side broke the Agreement first, the relations between the N.L.F. (now the Provisional Revolutionary Government in the South) and the North, the events of 1964 in the Gulf of Tongking, whether particular reactions by one side are proportionate to the necessity created by the other's wrong, and the viability and territorial control of the Saigon régime and its revolutionary counterpart in the South.

IAN BROWNLIE.

THE MIDDLE EAST CRISIS: TEST OF INTERNATIONAL LAW. Edited by JOHN W. HALDERMAN. Law and Contemporary Problems Series, No. 11. [New York: Oceana Publications Inc. 1969. viii and 198 pp. $7.50.]

THIS volume contains a number of papers of variable quality prepared for a regional meeting of the American Society of International Law which was held at the Duke University School of Law in March 1968. The main value of the collection is that it sets out the main legal issues arising out of the Arab-Israeli conflict; develops in some detail certain possible schemes which could help to provide a legal and institutional framework for an ultimate peaceful relationship between Arabs and Israelis; gives in footnotes references to where the main documentary evidence relevant to the issues may be found; and, since four of the twelve papers are by writers who represent diplomatically countries involved directly in the Arab-Israeli conflict, contains coherent accounts of the views taken by some of the main protagonists of the factual and legal issues involved. On the negative side it is fair to say that those papers which discuss for example the internationalisation of Jerusalem or the development of a binational state for Arabs and Jews leave the impression that the writers feel that if only Arabs and Jews would behave in a reasonable way it would be easy to provide a framework for their mutual co-existence. There is no bibliography, which is a serious omission in a work of this kind, although the footnotes compensate for this to a limited extent. Worst of all there is no index, which limits the practical utility of the book. The last paper in the book is an oddity. It is an account by Professor Thomas Franck and his research assistant, Dr. Gold, of the physiological and psychological basis of human perception of the external world applied to the fact-finding role of international observers in the Arab-Israeli conflict. An incident on Mount Scopus in 1958 involved U.N. observers in the task of determining, amongst other things, who had fired the first shot, where did the shot come from that killed a U.N. official, and whether an Arab village had been used as a base by Arab troops. After giving an account of the mechanism of human visual perception the authors conclude: "In the truce observer context, those questions of fact which are concerned with sensory perception of transient events or conditions are not appropriate for impartial third-party decision making. The reason these issues are inappropriate is that they cannot be answered objectively because even the most neutral of observers brings to his sensory-perceptive process a subjectivity which is the greater for being hidden deep in the sensory-perceptive process where reason and conscious argument do not enter. Such perceptions are really like opinions, but the more tenacious and irreversible because they come to our consciousness disguised as objective truth." The authors seem unaware of the fact that Bishop Berkeley long ago trod this path. The real issue however is whether the authors' premises lead to their conclusion and in the reviewer's opinion they do not. Everything the authors say correctly emphasises the limitations of human perception and the caution with which the evidence accumulated by international observers must be analysed, but it is claiming too much when an elementary account of the process of human sensory perception is supposed to lead to the conclusion that in a "truce observer context" (the force of this limitation is not easy to see) certain factual issues "cannot be answered objectively."

PAUL O'HIGGINS.

RESTATEMENT OF AFRICAN LAW. KENYA. VOLUME I: THE LAW OF MARRIAGE AND DIVORCE. VOLUME II: THE LAW OF SUCCESSION. By EUGENE COTRAN. General Editor, PROFESSOR A. N. ALLOTT. [London: Sweet & Maxwell Ltd. 1968 and 1969. xxxiv and 218 pp. xxvi and 191 pp. £8 18s. net (each).]

THE LAW AND PRACTICE OF NIGERIAN WILLS, PROBATE AND SUCCESSION. By BRIAN W. HARVEY. [London: Sweet & Maxwell Ltd. Lagos, African Universities Press. 1968. xx and 209 pp. £8 6s.]

UGANDA, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION. By H. F. MORRIS AND JAMES S. READ. (The British Commonwealth Series, Vol. 13.) [London: Stevens and Sons. 1966 (Paperback re-issue, 1969). xiii and 448 pp. £4 10s. (Hardback), £1 15s. (Paperback).]

LE DROIT DE LA FAMILLE EN AFRIQUE NOIRE ET À MADAGASCAR. Edited by KÉBA M'BAYE. Preface by MARC ANCEL. [Paris: Editions G.P. Maisonneuve et Larose, 1968. 295 pp. 29.60 F.]

IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW. Edited by MAX GLUCKMAN. [London: Published for the International African Institute by Oxford University Press 1969. 361 and xiii pp. £2 15s.]

THESE six volumes neatly demonstrate the multiplicity of approaches to the study of African law: the professional training of the author (as lawyer or anthropologist), the need which he is seeking to meet, and his linguistic and cultural background (Francophone or Anglophone) largely determine the form and content. The anthropologist is concerned with the working of law as a vital part of the institutions of the society he is studying; the lawyer may be concerned with the conceptual analysis of those institutions, but he is quite likely to be concerned with a far narrower issue: what rules apply, in the particular community in which he is practising, to govern the facts on which his advice is needed? This essentially practical question is often one of great difficulty: first, there may well be doubt as to whether a written law (normally European in origin or inspiration) applies at all, or whether the law directs a reference to a particular system of customary law; secondly, if it does, it may well not be clear what customary law is in point; thirdly, even if it is, the content of that law may be almost impossible to ascertain. Hence some of the tension and misunderstanding between anthropologist and lawyer: the lawyer tends to think that the anthropologist does not understand the kind of questions which ought to be asked; the anthropologist to think that the lawyer only wants answers which can be fitted into his alien conceptual system.

Perhaps the most important of these books, against this background, are the first two volumes of the Restatement of African Law Project. Their object is severely practical, namely the ascertainment of relevant customary laws, and their authoritative exposition. This will enable the (increasingly professionalised) courts and those who appear before them to have at least some reference point in cases in which customary law is applicable. There is no doubt that the present volumes will fill a substantial practical need: as Kenya's Attorney-General remarks in the Foreword to each volume, the book is "particularly valuable because, unlike previous works on customary law by anthropologists, it is an orderly and precise Restatement in language intended for use by lawyers." That is to say: here are the answers in a form which the European-trained lawyers can understand. A hostile critic would paraphrase this as: here are crude statements of the social institutions of a society, forced into a wholly alien mould. For instance, in the volume on marriage, two questions which are basic are answered: namely, at what precise moment of time does a marriage begin, and at what precise moment of time does it end—*e.g.*, we are told "The time at which a man and woman become husband and wife legally is . . ." But does this statement truly reflect the facts? Mr. Harvey also bemoans the fact that anthropological research is often "conducted with a degree of vagueness unacceptable to legal practitioners" (p. 48). But the anthropologist might well criticise the lawyer for insisting on a rigid answer to a problem which is not fully analysed in the same way in the social system under consideration. Again, the methodology of the Restatement may be criticised: a questionnaire distributed to local law panels has clearly formed the basis of much of the work. Unfortunately it is not reproduced. Yet it must be suspected that its form has closely influenced the substantive content: there is, for instance, an uncanny resemblance between the detailed enumeration of the circumstances in which, it is said, a wife has the right to leave the matrimonial home. At least the student will readily see why the law discourages leading questions!

Mr. Harvey's aim is, again, essentially practical: it is to set out for the benefit of student and practitioner, not only the relevant law, but also the procedure and technique necessary to apply it. No doubt there are still lurking in the dimmer corners of the legal world some who will feel that a book on succession which does not contain an exhaustive account of (for instance) the rule in *Whitby* v. *Mitchell* is an insidious attempt to deprive the student of an important part of the common law heritage. Those with such proclivities should avoid this book, since not only does it concentrate on the law as it is in the country to which the book relates, but it tells the student about such topics as making up drafts, suggests tactful ways of advising clients on their dispositions and even mentions the question of costs. Alas: this is clearly no book for a gentleman. No; but it is an excellent one for a lawyer. And although its great merit must be the way it approaches the complexities and confusion of Nigerian law (largely resulting from internal conflicts caused by ill-thought-out applications of English law and practice) it could at least give some ideas for a rather more realistic approach to the study of law in England than that fashionable among what one can only call the "landed gentry" school of English law teachers, who share the horror of a Victorian dowager at anything remotely smacking of "trade."

Dr. Morris's and Mr. Read's "Uganda" is another example of what a good textbook should be: it is clear, concise, yet comprehensive. It is also three years out of date: it is sad to read now the statement in the preface that the constitution of Uganda represents the "successful" outcome of negotiations in which the conflicting interests of Buganda and the rest of the country were reconciled. However, the fact that this is not now an up-to-date account of the Constitution should not disguise the fact that all the book retains great merit as an historical account, and that most of it remains an excellent summary of the main issues in the study of the law as applied in Uganda.

The book edited by Mr. Kéba M'Baye is a symposium of studies made, at the request of UNESCO, on African family law. There are two papers on Sénégal, one on the Ivory Coast, and one on Madagascar (representing the Francophone states); while essays on Nigeria, Ghana and Kenya represent Anglophone Africa. The papers are, inevitably, of somewhat variable standard: perhaps the most chastening thing for the English lawyer is the greater amount of sociological data which is available in many of the Francophone states (the paper by Professor L. V. Thomas on Senegal being outstanding in this respect). The underlying theme is the impact of modern political and social changes in family law. Generally, Francophone states have been more ruthless in suppressing indigenous traditions (*e.g.*, the Bride Price in the Ivory Coast and Gabon): this sometimes, however, leads to the development of parallel, and secret, practices which, even if illegal, are still carried out and regarded as binding.

The collection of papers, edited by Professor Gluckman, presented at the 8th International African Seminar held at Addis Ababa in 1966 is a welcome attempt to bridge the gap of disciplinary orientation and language referred to above. There is much of great value on the fundamental issues facing the jurist in Africa. Unlike the other books mentioned here, this has little immediate practical value; but in the long term much of it (and particularly the analytical introduction by Professors Allott, Epstein and Gluckman) will prove to be of seminal worth in seeking to formulate the basis for a distinctively African jurisprudence.

STEPHEN CRETNEY.

Neutralization and World Politics. By Cyril E. Black and Others. [Princeton University Press. London: Oxford University Press. 1969. xvii and 195 pp. (including Appendices). Bound 62s. net. Paper 17s. 6d. net.]

THIS stimulating monograph is of particular interest to the international lawyer for two reasons; first because the notion of the neutralised state provides a variable which serves to point the relative nature of the concept of statehood, and second because neutralisation represents a method by which states have sought, from time to time, to solve political problems, by the creation of heterodox legal institutions within a framework of binding legal obligations.

The work does not purport to be definitive, but seeks to examine the principal issues involved in neutralisation "as a concept relevant to the avoidance or settlement of an international conflict" (p. v). The text is primarily concerned with states as such, *e.g.*, Laos, Switzerland and Austria, but attention is also focused on areas such as the Gaza Strip, Kashmir, Antarctica and outer space. The authors examine the functions, utility, possibilities, maintenance, enforcement and particularly the problems of neutralisation, as an instrument of diplomacy, from the viewpoint of all states concerned, and by the use of examples both historical and contemporary. The discussion of the problems involved in the compatibility of the legal nature of the neutralised state with the obligations contained in Chapter 7 of the U.N. Charter (Chapters 8 and 7) is of special interest to the lawyer.

The work would have lost nothing had some repetitive material been eliminated. At times generalisations and predictions are made without arguments to support them, *e.g.*, pp. 104-105. The authors give no indication whether the provisions of their Draft Model Treaty (Appendix V) represent *legum leges* of the concept of neutralisation, or whether they are mere generalisations induced from state practice manifested in particular treaties. If the former then how does this square with the authors' argument, in discussing definitions of neutralisation (p. 1), that the concept is a relative one? It is surprising that the statement "The use of force under present international law is illegal except in self-defense" (p. 116) should be made without further comment.

Despite these criticisms the authors deserve credit for examining a neglected subject, which may well be an invaluable, if supplementary, device for the management of power in the international system. CLIFFORD HALL.

CORRESPONDENCE

THE EDITOR,

The Modern Law Review.

Dear Sir,

In a short space it is impossible to deal with the many points raised in Norman Selwyn's article ((1969) 32 M.L.R. 377 (July)). But in case silence be taken for consent I should like to deal briefly with three matters.

First, the intention of the parties. Whether they intended to make an enforceable agreement or not must be tested "objectively," not by what they say about it afterwards. Ford's advisers rightly judged that such evidence was irrelevant: for the lamentable effects of allowing a defendant to lead such evidence at the last moment see *Loman* v. *Merseyside Transport*.[1] The words used may be decisive: *Rose and Frank* v. *Crompton*,[2] *Appleson* v. *Littlewoods*,[3] *Parker* v. *Clark*.[4] If the words used are ambiguous the surrounding circumstances and known customary practices can be looked at: *Coward* v. *Motor Insurers' Bureau*[5]; *Edwards* v. *Skyways*.[6] The hypothetical reasonable man must be taken to have the same sort of knowledge as the parties to the agreement in question—just as in a case of professional negligence the standard of knowledge required of the defendant is that of a competent professional man, not that of a layman. Hence legal, academic and industrial opinion was relevant so far as it might reasonably have been expected to be known to the parties concerned. So is the form of the agreement. It may be, in fact, that signature and even stamping prove very little. But a seal is something more than a quasi-legal mumbo-jumbo designed to impress the other party with the solemnity of an obligation which is not really enforceable at all.

Such devices are still very uncommon. The simple solution which Mr. Selwyn appears to avoid is that some collective bargains have contractual force but most of them do not. Most negotiators on either side would be astonished to be told that the agreements they made were contractually enforceable as between themselves. But the famous Boot and Shoe Agreement settled in 1895 by Sir Henry James, later Lord James of Hereford, clearly shows on its face that it is intended to be legally enforceable. By Resolution 9, if any provision of the agreement is broken by any manufacturer or body of workmen belonging to the Federation or the Union as the case may be, then if the offender is not expelled within ten days, "the Federation or the National Union shall be deemed to have broken the agreement, award or decision." In addition, there is a Trust Deed of 1968 for carrying the agreement into effect. Again, the Henry Wiggin agreements may be enforceable as between the firm and the unions. The latter are expressed to act both as principals and as agents for their members: and closely parallel agreements, undoubtedly contractual, are signed by every workman individually. Henry Wiggin is a subsidiary of the International Nickel Co. of Canada and the agreements are somewhat on American lines. There is nothing specially "ironical" about this. It is just unusual. Nor is it easy to understand how there can be a distinction between "an agreement not intended to be legally binding" and "a contract which is not intended to be enforced at law." The answer to this was given in *Balfour* v. *Balfour*.[7]

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[1] (1968) 3 I.T.R. 108; (1969) 32 M.L.R. 99.

[2] [1923] 2 K.B. 261.

[3] [1939] 1 All E.R. 464.

[4] [1960] 1 All E.R. 93.

[5] [1963] 1 Q.B. 259.

[6] [1964] 1 W.L.R. 349.

By contrast the language of the Ford agreement (and of many others) could fairly be described as aspirational: "every attempt will be made to resolve issues raised" and until the due procedure has been carried through "there shall be no stoppage of work or other unconstitutional action." It is a strong thing to imply without the clearest possible words a contractual promise that a third party shall or shall not do any particular thing, *a fortiori* when you are not his agent and, above all, when what you are allegedly promising is that he will continue at work when he does not want to. Such a promise, even when expressly given under seal (in a lease), was held unenforceable by injunction in *Ryan* v. *Mutual Tontine Association*.[8]

Second, a word about Mr. Selwyn's authorities. The plaintiffs in *East London Bakers Union* v. *Goldstein*[9] were suing not for a breach of the written agreement but of an alleged collateral agreement made orally. The Court of Appeal upheld Grantham J. in refusing to continue an *ex parte* injunction because they said there was no sufficient evidence that the oral agreement had ever been made. *Smithies* v. *N.A.O.P.*[10] is unsatisfactory for several reasons: but at least it never occurred to the plaintiffs, who were complaining of a strike in breach of a procedure agreement, that they could sue on this as if it were a contract; instead they sued the union in tort for unlawfully inducing two workmen to break their individual contracts.

The *Bradford Dyers'* case[11] is more interesting but equally unconvincing. It was brought after the collapse of the General Strike against a union whose leaders had never wanted to be party to the strike anyway; they had written a deeply apologetic letter of regret to the employers' association, only to be told that it was not humble enough and they must try again. They were threatened with proceedings against themselves personally and against every workman involved as an alternative to submitting to judgment in an action for nominal damages against the union. On this basis the plaintiffs tried to get a declaration by consent, which the judge very properly refused. Like Astbury J.'s judgment in *National Sailors' and Firemen's Union* v. *Reed*[12] the case had more value as industrial propaganda than as law; and Sir Henry Slesser was understandably anxious that his clients' abject surrender should not be taken to affect anyone else. The defendants might have resisted on two grounds. The Bradford Dyers' Association was no doubt a trade union: so, in the first place, they had a defence in section 4 (4) of the 1871 Act; and secondly, the plaintiff company was invalidly constituted. If it was a trade union it was nothing to the point that it purported to have been incorporated under the Companies Acts; it was the registration as a company that was void, not its status as a trade union.[13]

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[7] [1919] 2 K.B. 571.

[8] [1893] 1 Ch. 116.

[9] *The Times*, June 9, 1904.

[10] [1909] 1 K.B. 310. (The facts arose before 1906.)

[11] *The Times*, July 24, 1926. I am grateful to Mr. Selwyn for showing me the documents relating to this case.

[12] [1926] 1 Ch. 536.

Opinions may well differ about the headnote in *Young's* case.[14] The Canadian case law in 1931 was in a confused state; on balance it is submitted that Geoffrey Lane J.'s interpretation was right, and several other Canadian cases tend to support his view.[15] Incidentally, at this time neither the Canadian nor the English courts were willing to allow the collective bargain to have even indirect legal effect, by way of incorporation into the individual's contract of service. Also, the dicta in *Hynes* v. *Conlon*[16] are dicta, the court holding that the defendants had done nothing illegal. In any case, if their acts required a justification it could easily be found without assuming that the collective agreement in question was an enforceable contract.

Finally, Mr. Selwyn's article itself demonstrates that the overwhelming weight of legal opinion has always been that collective bargains are not enforceable contracts. No doubt different reasons have been given for this at different times: there was hardly any need to discuss the intention of the parties before the *Taff Vale* case[17] when everyone assumed that the unions lacked sufficient legal personality to sue or be sued; and when practically all the agreements in question were caught by section 4 (4) of the 1871 Act anyway. As for the hustings, of course all these examples, so far from casting doubt on the general consensus of opinion that collective bargains are unenforceable, serve to reinforce it. It is nothing to the point that some of those quoted—like the Confederation of British Industry—were anxious that the law should be changed. It was one of the defendants' strongest points in the *Ford* case that if the law had really been as the plaintiffs contended, all these heated political discussions would have been unnecessary and meaningless. ***Mutatis mutandis***, the words of Atkin L.J. will still serve to explain why collective agreements are not, and ought not to be, enforceable:

> "(These agreements) are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Arrangements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code."[18]

University College, London. G. DE N. CLARK.

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[13] Mr. Selwyn's note on p. 388 is mistaken, even though in good company: see the Report of the Donovan Commission, para. 786; s. 5 of the Act of 1871; *Citrine's Trade Union Law*, 3rd ed., pp. 145–146; and Hickling in (1964) 27 M.L.R. 625.

[14] [1931] A.C. 83.

[15] See A. W. R. Carrothers, *Collective Bargaining in Canada* (1965), Chap. 20.

[16] (1939) Ir.Jur.Rep. 49. Mr. J. B. McCartney of Queen's University, Belfast, has drawn my attention to other Irish cases more closely in point. Suffice it to say here that there are good reasons against following them in this country.

[17] [1901] A.C. 426.

[18] *Balfour* v. *Balfour* [1919] 2 K.B. 571, 579.

THE EDITOR,

The Modern Law Review.

Dear Sir,

I wish to answer two of the points made by Mr. A. I. Ogus in his criticism of the Law Commission's Report on Proceedings Against Estates at (1969) 32 M.L.R. 551. One of Mr. Ogus's main concerns is that the Law Commission's recommendation that the "six months' rule" be abolished will lead to undue delay in the administration of estates. The Law Commission pointed out that the personal representatives may protect themselves by advertising for claims under section 27 of the Trustee Act 1925. Mr. Ogus comments that "If the personal representatives had no suspicion of a claim it seems unlikely that they would have protected themselves by advertising under section 27." This comment, however, ignores that it is at present the common, and certainly the wise, practice to publish a section 27 advertisement, if only for the purpose of ascertaining any debts against the estate. The practice is not followed, at present, in cases (i) where the estate is very small, (ii) where inquiries from the next-of-kin do not reveal any likelihood of unknown debts, and (iii) presumably, where the estate is administered without legal advice. Since the standard form of advertisement includes all types of claims against the estate (see, for example, the precedent in the *Encyclopaedia of Forms and Precedents*, 4th ed., Vol. 8, p. 760), it follows that in the majority of cases the personal representatives are on the existing practice protected against unforeseen claims. No doubt, if the Law Commission's proposal is implemented by legislation, it will become the practice to advertise for claims in respect of all estates being administered with legal advice; the protection is very cheaply bought and involves very little delay. Mr. Ogus's fears about undue delays in administration are therefore likely to prove groundless.

The protection conferred by section 27 does not, of course, avail the beneficiaries, and Mr. Ogus is right to point out the difficulties caused by a large claim against the beneficiaries. The beneficiaries are equally at risk in respect of other claims, however, for example a claim by an unpaid creditor or a wrongfully deprived beneficiary. In my view, there is no good reason, and certainly Mr. Ogus does not suggest any, why the beneficiaries should be in a better position where the claim is against the estate as representing the deceased tortfeasor.

G. BATTERSBY.

University of Sheffield.

LAND LAW AND CONVEYANCING REFORMS

THE Law of Property Act 1969 (considered in an article by Stephen Cretney under the above title in (1969) 32 M.L.R. 477) received the Royal Assent on October 22, 1969. Last minute changes after the article went to press have the following effects:

1. The Act (with a minor exception) came into force on January 1, 1970 (not three months after the Royal Assent, as stated in note 2 on p. 477).
2. A new clause was introduced into Part I of the Act, dealing with the law of business tenancies; the correct references to the Act in the article can be found by adding 1 to each section reference.
3. A number of minor drafting changes were made. It is not thought that these affect the accuracy of the article.

THE
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INQUEST ON THE ROSENBERG-SOBELL CASE[1]

On March 6, 1951 Julius and Ethel Rosenberg and Morton Sobell were charged before a United States Federal Court in New York State with conspiring to commit espionage in wartime, a capital offence. After a long trial they were convicted of the charge by the jury. On April 5, 1951 Julius and Ethel Rosenberg were condemned to death and later executed: Morton Sobell was sentenced to thirty years' imprisonment.

This trial, described by the *Columbia Law Review* "as the outstanding 'political' trial of this generation," naturally attracted attention all over the world. Much has been written about it since, as the result of which a great deal more is known than was proved to the jury. In particular the researches of Walter and Miriam Schneir leading to their book *Invitation to an Inquest* seem to me to be of such importance as to require the attention of all who feel concern at possible miscarriages of justice, particularly when death sentences have been imposed and carried out in a time of intense political hysteria. I make no apology therefore for presenting an extensive summary and analysis of the evidence presented in this volume.

In the Peruvian Andes while travelling on the highest railroad track in the world the authors of this book got into conversation with a Franciscan friar in the course of which he put to them the question, "Do you think the Rosenbergs were guilty?" Although they had, curiously enough, embarked upon a study of the Rosenberg case with a view to discovering the answer to that very question they were unable to give the friar an answer. This book shows how they eventually arrived at the answer, which is one of "not guilty." It is unlikely that anyone who studies with an open mind the evidence which they produce will disagree with them in the conclusion that as the evidence stands at present the case against the Rosenbergs is not made out beyond " the reasonable doubt " which the criminal law requires, and many will form the opinion that they were in fact not guilty.

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[1] *Invitation to an Inquest.* By Walter and Miriam Schneir. viii and 487 pp. New York, 1968—a Delta Book. $2.45 (paperback).

The Franciscan, seeing the difficulty which the Schneirs had in replying to his query, went on, " In any event they should not have been killed. The sentence was too harsh. The Pope had appealed for clemency." In this he shared a view which was dominant throughout the civilised world and which was widely held in the United States itself by very many people who felt that the prosecution had proved their case. Unfortunately President Eisenhower, who obviously gave the most anxious consideration to the appeals for clemency which came in to the White House from all parts of the world, decided that it was " his duty not to set aside the decision " of the judge who had imposed the death penalty on Julius and Ethel Rosenberg.

I well remember taking part in this appeal for clemency in company with Mr. Gerald Gardiner, Q.C. and Mr. Elwyn Jones, Q.C. (as they then were) and during the visit to the U.S. Embassy made it clear that we were not claiming that the verdict of the jury was wrong, at any rate in respect of the Rosenbergs, only that they should not be executed. As the case stood when it was left with the jury it was in a state when men of " intelligence, goodwill, and sincerity "—I quote the Schneirs—could take the view that the Rosenbergs were guilty and indeed that they should suffer death. But the case is not now in the state in which it went to the jury: much work has been done on it, largely by the Schneirs themselves, and it is the objective of the present book to set out the facts as they are now known. The result is a narration which for an ordinary reader must be as gripping as any essay in crime detection he has ever read, and for the lawyer a fascinating and deeply disturbing proof of the difficulty of reaching just solutions of the problems with which he is confronted, especially at times when emotion rather than reason holds sway.

The book opens with a number of short chapters on the Manhatten Project and the development of the atom bomb. At first this seemed to me to be a mistake, but I agree that it is essential to an understanding of the Rosenberg case to re-create the atmosphere which existed in the U.S.A. at that time, and particularly to bring out the deep gulf in the knowledge of the relevant material between the scientists and the other sections of the community, including very much the lawyers and the politicians. Such people could make statements about matters of scientific knowledge on which they were quite incompetent to speak and without any evidence whatever; statements which it was clear enough to competent scientists were just boloney: indeed such statements were made by prosecuting counsel and judges directing juries in the series of cases with which this book deals.[3] Thus while the Franks Report signed by seven eminent scientists who had all taken part in the research leading up to the bomb stated in June 1945 that "it might take other nations three or four years to overcome our present head start" but that they would do so before very long was certain—actually the U.S.S.R. took exactly that sort of period to achieve nuclear fission, for radiation from their experiments was observed in 1948 and an explosion occurred during August 1949—yet Judge Kaufman stated during the Rosenberg case that the conduct of the prisoners "in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the communist aggression in Korea." This was, of course, made without any evidence and was in fact not true, but it is symptomatic of the atmosphere in which the case was tried.

It was because of the widespread opinion in the U.S.A. that that country would have the monopoly of atomic power for many years that the disclosure of the Fuchs betrayal caused so much consternation there. This sparked off a period of intense activity on the part of the F.B.I. Their agents were allowed to question Fuchs in London and within three days of this Harry Gold, a leading figure in the whole of this business, had been arrested in Philadelphia (May 23 1950)—he does not correspond to the description given by Fuchs and it is impossible to believe that the F.B.I. had not already decided to pounce upon him before they held their interview with Fuchs. However, he was quite ready to own up—indeed he appears to have obligingly owned up to everything the F.B.I. put to him from then onwards.

During the summer a number of other arrests were effected including the Rosenbergs and Morton Sobell—*nine* in all. Several of these were for obstructing justice or for perjury—of apparently decent people who were all immediately pilloried in the newspapers as "atomic spies," and members of the "Fuchs ring." Typical of these was the case of Brothman and his business associate Miss Moskowitz. Little could be said against them beyond the fact that Brothman who ran a small, but high class, engineering business wishing not to be involved in communism and espionage charges had denied that he recognised a photograph of the communist renegade Elizabeth Bentley and her Russian lover whom she had once brought to his works. This was "obstructing the course of justice." In the end the prosecution admitted that various blueprints and other documents which Brothman had had were not secret: in fact there was no shadow of an espionage case against him, though he had already been found guilty of this enormity in the U.S. Press. Convicted of the obstruction he was sentenced by Judge Kaufman to seven years' imprisonment and a $15,000 fine—the maximum possible under the statute, and the even more unfortunate Miss Moskowitz, who seems to have been still less guilty of anything serious, was sentenced to two years and a $10,000 fine—a maximum sentence too, as the offence with which she was charged was less grave. But listen to Judge Kaufman, "I regret that the law under which these defendants are to be sentenced is so limited and so restricted that I can only pass the sentence which I am going to pass, for I consider their offence in this case to be of such gross magnitude. I have no sympathy for these defendants in my heart, none whatever." This was the first of this run of prosecutions and this was obviously the feeling throughout of the judge who was to try them all.

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[3] Even President Eisenhower in confirming the death sentence stated that the Rosenbergs had "immeasurably increased the chances of atomic war" and no doubt believed what he said.

The first hundred pages or so of this book is taken up with these preliminary matters, and very properly so. The case of *U.S.* v. *Rosenbergs and Sobell* forms Part II of the volume and together with the sentencing, the several attempts that were made to reverse the decision, and the efforts to obtain a respite of sentence occupies some 140 pages—the trial itself is objectively described in one comparatively short chapter of fewer than forty pages; for such a lengthy affair the summary is excellent. The case for the prosecution was presented in a more relentless fashion than would be regarded as proper in England. And it could be—indeed it was at the time—argued that Judge Kaufman showed too much sympathy with the prosecution.[3] Certainly the judge who was an experienced criminal lawyer, having himself been a U.S. District Attorney, made the essential points of the law clear to the jury in his summing-up. As we have seen the charge was of conspiracy to commit espionage in wartime. Five defendants were named in the indictment, but one of these, Greenglass, had pleaded guilty and was in fact the key witness for the prosecution and another was a Soviet agent who had left the country. Effectively, therefore, the defendants were the two Rosenbergs and Morton Sobell. Although for Sobell the terrible importance of his case should not be minimised—he is fortunately still alive and, indeed, has recently been released on parole—the real core of the prosecution was the charge against the Rosenbergs who suffered death. Sobell's case is therefore, in that sense, less important, and indeed from the legal point of view it is much simpler both on the law and the evidence. I propose therefore to discuss it first.

The case against Sobell which was of conspiracy with the Rosenbergs was to all intents quite distinct from that against the Rosenbergs themselves, although on the vaguely worded indictment it was possible to argue that he was inculpated in anything which the Rosenbergs did,[4] and in my view he ought never to have been charged on the same indictment. I think that any English judge would have ordered a separate trial, or at least required a clearer elucidation of the charges in separate counts, and I expressed this opinion forcibly on the visit to the U.S. Embassy described earlier. As it was, Sobell could be and was tarred with the Rosenberg brush, and it is impossible to believe that the jury was not influenced by this.

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[3] The judge's conduct of the trial was raised in one of the appeals, but the appellate tribunal ruled against the submissions.

[4] The charge against him was in fact the same as that against the Rosenbergs and the jury returned the same verdict. The judge held that "the evidence on

The only evidence against him was that of Elitcher who had been his friend, and who curiously enough was the first prosecution witness. If Sobell was in fact guilty Elitcher was his accomplice, self-confessed. The rule of procedure in the Federal Courts of the U.S.A. is apparently the same as that in England—corroboration of the evidence of an accomplice is not essential, but it is dangerous to act upon it without corroboration. It is not clear from this book how far Judge Kaufman directed the jury on this matter, if at all. In fact there does not appear to have been any corroboration of Elitcher's evidence whatever. Even on this as it stands the case against Sobell depends to a large extent on statements alleged by Elitcher to have been made to him by Julius Rosenberg himself, such as that Sobell "was helping him." Since Sobell was not present when those remarks were alleged to have been made their admissibility seems doubtful, and their evidential value is obviously small. However, Elitcher did connect Sobell with the Rosenbergs in connection with activities which he himself considered to be concerned with "espionage business," and it can therefore be argued that a jury properly directed could have found Sobell guilty on Elitcher's testimony.

It must be pointed out, however, that in his first evidence in chief Elitcher entirely failed to establish the connection with Rosenberg. He had to be taken over his evidence again by the prosecutor and was for practical purposes led into his proof in this way. When it is considered that he admitted that at the time when he was interrogated by the F.B.I. he was in a state of considerable fear, and when it is further considered that it is reasonably clear from other parts of this book that much of the evidence of witnesses in these cases was literally put into their mouths by the interrogating agents, one is entitled to infer that Elitcher's first impromptu description in the witness box of what happened is more likely to be true than what the F.B.I. agents got him to put into his statement.

Unfortunately, Sobell did not go into the box to deny the case, however flimsy, made against him. He afterwards explained that his advocate had decided not to call him because he did not think that the jury could possibly find him guilty on such meagre evidence. It is more likely that the defending counsel did not wish to subject his client to cross-examination on a quite different

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the case did not point to any activity on his part in connection with the atom bomb project." He did not therefore feel that he could sentence him to death.

matter, his removal at a crucial time in the case from the U.S.A. to Mexico City. This could be and was made the subject of much prejudice by the prosecution, though it clearly provides no evidence whatsoever of conspiracy with the Rosenbergs. There can be little doubt that this so-called " flight from justice " weighed heavily with the jury—Sobell was in fact kidnapped by the F.B.I. in collusion with the Mexican police and forcibly removed to U.S. territory. Clearly the U.S. authorities thought that above board extradition proceedings would fail. The removal to Mexico City having been brought in by the prosecution only Sobell could effectively explain it. The decision on the part of his lawyer not to put him in the box is a classical illustration of a difficulty which defending advocates have to face from time to time. There can be little doubt that in this case a mistake was made by the lawyer. In the end Sobell was found guilty and sentenced to thirty years' imprisonment—a punishment which was considered at the time to be savage by many even of those who felt him to be guilty, and which in retrospect appears quite indefensible. He was destroyed by being associated in the Press and in the public mind with the Rosenbergs and the so-called " spy ring " and by the hysteria roused in the American people by the loss of their monopoly over the secrets of nuclear fission. In actual fact no evidence of espionage or involvement in any betrayal of nuclear fission secrets was ever offered against him.

The case against the Rosenbergs—or rather against Julius, because that against Ethel was much more tenuous—was altogether more complicated, and indeed on the face of it much stronger. The circumstantial details recounted by the main witnesses for the prosecution fitted together and seemed to provide an integrated case which the jury might well accept and which certainly made it difficult, if not impossible, for the defence to argue that the verdict should be set aside on grounds of " no case."

What the Schneirs set out to do was to examine whether this case against the Rosenbergs was really so convincing as it appeared, whether the evidence was all before the court and, if not, what other evidence there was: further, had the evidence actually given been properly evaluated, and how far on a full analysis does it really bring home the guilt of the Rosenbergs " beyond reasonable doubt "? Not far short of half the volume is taken up by the " inquest " at the end of which the reader is in effect asked to answer the above question in the negative.

This inquest was carried out most conscientiously and in great detail. An attempt was made to see and interrogate not only every living witness who gave evidence, but also all those who conceivably could throw light upon material episodes. The exhibits were obtained so far as possible, and subjected to intense and sometimes rewarding scrutiny. Clearly an attempt even to summarise all this would carry this notice to altogether inexcusable length: it is a task for the reader which I would urge him to undertake. All that I have space to do is to attempt to bring out some of the more salient points.

The whole of the evidence was that of accomplices—" almost entirely," said Judge Frank on one of the appeals, but I cannot accept the qualification. Except in so far as one accomplice corroborated another it was uncorroborated. With two possible and interrelated exceptions to which prolonged scrutiny is given, and which I mention later, the oral evidence was not supported in any way by the fairly numerous exhibits.

The case against the Rosenbergs, as it developed, was based on the alleged handing over by David Greenglass of sketches of the method of nuclear fission used at Los Alamos to the intermediary Gold (mentioned above in connection with Fuchs) at the instigation of Rosenberg. This meeting between Greenglass and Gold which was alleged to have taken place at Albuquerque on June 3, 1945 was treated by the prosecution as the crux of their case and they purported to prove Gold's presence in Albuquerque on that day by means of a Welcome Card from the Hilton Hotel. This card shows the date June 3 on its face in handwriting, but on the reverse shows 12.30 p.m. June 4 under the hotel's official rubber stamp. This discrepancy which is of vital importance was not observed at the time. The importance of the point lies in two facts; that June 3 was a Sunday when Greenglass was on leave from Los Alamos; and that Gold averred and the Greenglasses agreed that he paid them $500 when he got the sketches, $400 of which was paid into a newly opened account the next day: and the payment in was evidenced from the bank's books. But if the money was not paid over till the afternoon of June 4 it would seem incredible that before the bank closed for business an account could have been opened and the money paid in. These two documentary items to which the prosecution attached vital importance and which provide the only really material non-oral evidence in the case turn out to have little, if any, evidential value. Even as they stood at the trial they do not seem to amount to corroboration of the evidence against the Rosenbergs.

But the Schneirs go further and put up a plausible case in support of a contention earlier advanced by other students of this trial to the effect that the entry relating to June 3 on the face of the card was forged. If this is so the forgery must have been carried out, or connived at, by the F.B.I., and it is, of course, for this reason that the name Rosenberg has been coupled with that of Dreyfus.

Unfortunately all this argument about the Hilton card has had to be carried out on the basis of photostatic copies, since the Justice Department did not retain the originals. In 1967 an attempt was made on behalf of Sobell to get his case reopened, *inter alia*, on the basis of the alleged forgery, but Judge Weinfeld pooh-poohed the whole business, and refused to have the point tried out. I doubt myself if the forgery could be proved, but the contention, which is a very serious one, was not lightly made, and in the interests of justice ought to have been investigated.

Only a minute fraction of the Gold saga was material to the Rosenberg case, but that fraction was, as we have seen, quite crucial. Gold evidently gave his evidence convincingly and was not cross-examined; indeed defending counsel made a damaging admission as to the way in which it had been given. This was a grave error, since Gold was in fact a completely unreliable witness. He seems to have been one of that romancing type who require particularly careful cross-examination if they are not to mislead the jury. As a witness of truth Gold is completely demolished in this book. I will give just one example of the several lines of attack on him. At the time of his arrest he was allocated a legal adviser with whom he had several long interviews which were tape recorded. He agreed that the Schneirs should be given a replay of the tape. Although he was alleged to have made a full and detailed confession to his legal adviser some of the statements most damaging to the Rosenbergs which he made at the trial do not appear on the tape. So much was this so that his legal adviser wrote to him pointing out that what he had said in the witness-box was " completely at variance with the facts as I got them from you." To which Gold actually replied that the wording which he had used at the trial " was the direct result of various conversations I had had with the U.S. Attorneys here in New York " !

There are also a number of instances in the book in which similar accusations of putting evidence into their mouths are made against the F.B.I. agents by persons questioned by the Schneirs. A Mrs. Sedorovich describes (p. 300) how the F.B.I. men had " repeatedly been at her to confess " that she had been in the West as a courier, and a Miss Glassman (p. 299) referring to a book which she had read about " F.B.I. harassment " said in respect of her own experiences with them " it is everything it is said to be and then some." A serious indictment of F.B.I. methods could certainly be drawn up from the pages of this book, and, at the end, one can legitimately wonder how much of the Rosenberg case would be left standing if the F.B.I. had acted throughout in an above-board and decent way: had they indeed observed our own " judges' rules."

However, it is Greenglass's testimony which makes the main case against the Rosenbergs. It is subjected to a very damaging analysis by the authors, who also stress a number of other reasons why this witness was untrustworthy. However, he was cross-examined, and much of this material was put to him. The jury saw and heard him: whether without Gold and the prejudicial material earlier commented on they would have accepted this evidence it is impossible to be sure, but upholders of their verdict will no doubt maintain that they would have done just that.

The prosecution in this case was conducted by a team of experienced and able lawyers who certainly did not behave as ministers of justice according to our English conception of the way a prosecution case should be conducted—indeed on one matter a higher court indicated that had the application been made timeously a new trial would have been ordered, so poorly did they think of District Attorney Saypol's conduct of the case. On the other hand, Emanuel Block, the Rosenbergs' advocate, was obviously not an experienced criminal lawyer, and was unable to stand up to his more expert opponents.

The procedural rules in the U.S.A. seem to assist the prosecution in a number of ways. In particular one notices time after time the absence of the careful preliminary hearing before committing magistrates which we have in England. This, together with valuable conventional procedures, prevents the defendant from being taken by surprise at his trial. Much of the detail of the case, particularly on the scientific side, seems to have taken the defence advocates by surprise and some of their reactions are not easy to follow and seem to have been mistaken.

The prosecution put in a replica of what was said to be a " sketch of the atom bomb " made by Greenglass and handed to Rosenberg in September 1945 (photos opposite p. 225). It is difficult in 1969 to understand how any unprejudiced person could have attached importance to these most rudimentary sketches. And indeed their value as blueprints for nuclear fission was accepted at the trial on the evidence of one Derry who disclaimed scientific standing, stating that he was " a constructional man ": no scientist was called to deal with a matter which one would have thought of vital importance, but perhaps the prosecution could not find a scientist who was prepared to give evidence for them. When at a later stage an attempt was made to get the matter reopened so that three eminent scientists who had been actually concerned with the work at Los Alamos could depose to the uselessness of the Greenglass sketches Judge Weinfeld in rejecting the application said that the defence " had been free to call " such witnesses at the trial. In England the need for such evidence would have been made clear by the proceedings in the magistrates' court and the necessary steps to secure it have been taken. As it was the jury were no doubt led to believe that the U.S.S.R. learned the secret of nuclear fission from these miserable bits of paper. And the trial judge, a lawyer and not a scientist, seems to have shared this extraordinary opinion.

The hysteria which struck the U.S.A. at this time even affected the Supreme Court: a decision by Justice Douglas which would have had the effect of respiting the sentences on the Rosenbergs until after the long vacation and might therefore have led to the production of some of the evidence brought out by the Schneirs in this book was considered on the very next day at a hastily convened meeting of the court to which the justices, some of whom had gone away on vacation, had to be brought back—we are told that this was the third time in the whole history of the court that such a thing had happened. Justice Douglas's stay was then vacated and that very night Julius and Ethel Rosenberg were executed.

Justice Frankfurter did not write his opinion in this last case until after the death of the Rosenbergs, and his final sentence is quoted, appropriately enough, at the beginning of this volume. It is worthy of remembrance:

"To be writing an opinion in a case affecting two lives after the curtain had been rung down upon them has the appearance of pathetic futility, but history also has its claims."

CHORLEY.

"LORD THURLOW'S EQUITY" OR "A CUCKOO IN THE LEGAL NEST"?

A RECENT decision of the Court of Appeal has provoked the following thoughts.[1]

1. THE NEST

It is an elementary proposition of the common law that the title deeds to land do not necessarily follow the estate. A man may give or grant his deeds, *i.e.* the parchment, paper and wax to another at his pleasure, and the grantee may keep or cancel them.[2] A man may retain a debt and give away the property of the deed which governs the debt.[3] From this proposition there seems at an early date to have grown up a custom of offering informal security by deposit of deeds to a lender. This transaction would be unaccompanied by writing and would take the form of a lien or pledge of the deeds which are described as "the sinews of the land." [4] The purpose would simply be to prevent the borrower from disposing of the estate until the debt was paid but would of course normally give the lender no action upon the security save in so far as he could prove the debt and was within the usury laws.[5] The lender would simply rely upon his right not to return the deeds until the whole debt had been paid.[6] He thus seems to have had a lien upon the deeds which had by then come to be regarded as chattels. A lien is defined as a right in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.[7] This is distinguished from a pledge in that a lien is an unassignable personal right which subsists only so long as possession of the chattels subsists, whereas a pledge gives an assignable interest.[8] Similarly a mortgage is an assignable right in the property charged and does not depend for its existence upon possession. It is thus clear that before equity intervened there existed an informal method of securing a debt by deposit of deeds which amounted either to a lien or possibly to a pledge.[9]

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[1] *Re Molton Finance Ltd.* [1968] Ch. 325.

[2] Sheppard's Touchstone, 242. *Kelsack* v. *Nicholson*, 2 Cro.Eliz. 496.

[3] *Ibid.*

[4] Co.Litt. 6A and see *Clayton* v. *Clayton* [1930] 2 Ch. 17 and *Ex p. Whitbread* (1812) 19 Ves. 209, 210. Title deeds were originally not regarded as chattels and were not larcenable. See *per* Maugham J. [1930] 2 Ch. 18.

[5] As to equity and the usury laws see *Lodge* v. *N.U. Investment* [1907] 1 Ch. 300.

[6] See, *e.g.*, *Head* v. *Egerton* (1734) 3 P.W. 280.

[7] See *per* Grose J. in *Hammonds* v. *Barclay* (1802) 2 East 227, 236 and *Halsbury's Laws of England*, Vol. 24, pp. 142, 145, 147.

[8] *Donald* v. *Suckling* (1866) 1 Q.B. 585, 612. The decision of the Court of Appeal in *Re Richardson* (1885) 30 Ch.D. 396 seems to decide, possibly *obiter*, that the deposit of deeds does not normally create a pledge. See *per* Fry L.J.

2. LAYING THE EGG

This seems to have been the position when in *Russel* v. *Russel*[10] and in *Featherstone* v. *Fenwick*[11] and *Hurford* v. *Carpenter*[11] Lord Thurlow began to hold that in such a situation the holder of the deeds had an equitable mortgage. This overcame the difficulties of the Statute of Frauds requiring written evidence of the mortgage because it was said that the deposit constituted an act of part performance. The deposit of the documents for consideration is to be taken as evidence of an agreement to create a mortgage.[12] To the chagrin and disgust of Lord Eldon who was counsel in one of these cases[13] this proposition became too well established to be reversed.[14] Despite the general disapproval of the legal profession and the judges,[14] Lord Thurlow's equity thus established what was to become later one of the principal forms of mortgage and one of the major grounds of distinction in the scheme of the Law of Property Act as to mortgages.[15] The equitable mortgage by deposit of title deeds has grown into a mortgaging system of great importance and convenience.

3. HATCHING

By 1812, at least, the law had therefore reached a position which is expounded by Lord Eldon as follows:

> "Upon this subject I must always protest, that the doctrine now prevailing ought never to have been established. The law previously was, that if there was a clear mortgage, and a subsequent advancement, the latter could not be added without writing. When that was once determined how could it be said, that these deposits should have this effect? They have their legal effect without passing any interest in the land. The creditor has the benefit of his contract by retaining the deed; but that he is to have an interest in the estate is quite a different thing."[16]

He defined the earlier situation as follows:

> ". . . many cases occurred, in which persons, having title deeds in their hands, had a right to say, they had an interest in the deeds, but not in the estate, except collaterally: if, for instance, the owner could not part with the estate without the deeds, he should not have them without paying the debt;

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[9] *Ibid.*

[10] (1783) 1 Bro.C.C. 269.

[11] See reporter's note to *Russel* v. *Russel.*

[12] s. 40 of the Law of Property Act 1925 does not affect the law of part performance (*Ibid.*, s. 40 (2)).

[13] *Featherstone* v. *Fenwick* (1783) 1 Bro.C.C. 270a.

[14] See *Ex p. Mountfort* (1808) 14 Ves. 606.

[15] See s. 97 of the Law of Property Act 1925.

[16] *Ex p. Whitbread* (1812) 19 Ves. 209.

the possession of the deeds giving no direct interest in the estate, but an interest, arising out of the power of embarrassing the proprietor in the sale." [17]

Lord Eldon's objection to Lord Thurlow's equity was expressed in an earlier case [18] where he said:

> "I remember, previously to *Russel* v. *Russel*,[19] it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; resting altogether upon parole; and it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards from favour to that creditor to say, they were deposited with him for the purpose of securing his debt; and so all the perjury that the statute meant to avoid is introduced; and the rule changed. But Lord Thurlow was of opinion, and that is not now to be disturbed, that the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact, that entitled the Court to give an interest."

A further refinement, however, arose where the deposit was accompanied by some written contract, and in this case Lord Eldon makes it clear that the purpose of the deposit is to be found in the construction of the written agreement.[20]

4. GROWTH

Throughout the nineteenth century it seems that this equitable doctrine once established became of such importance and gave such satisfactory remedies to the person with whom deeds had been deposited, that the old common law element of the possessory lien declined and came to be often overlooked.[21] Questions of priority arose when fraudulent or careless borrowers by one means or another split up the documents of title and deposited different deeds with different lenders.[22] The criterion as between the lenders was whether or not a lender had been negligent in checking the title deeds. The effect of some of these cases is difficult to assess because had the possessory lien been advanced as an argument it would seem that the decision must have gone the other way, but the argument was never advanced. The question whether the holder of deeds under a mere parole gift was in the same position as a commercial mortgagee also arose.[23] However, despite the niceties and complications which inevitably occur in cases of this type, it seems fair to say that wherever the right to retain possession of the deeds was firmly argued the court showed enormous reluctance to override the possessory claim. Thus in *Barton* v. *Gainer* [24] some railway mortgages had been handed over without the necessary transfer formalities. Martin B. said [25]:

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[17] *Ibid.* at p. 211.

[18] *Ex p. Coming* (1803) 9 Ves. 115, 117.

[19] (1783) 1 Bro.C.C. 269.

[20] *Ex p. Kensington* (1813) 2 V. & B. 79. *Wylde* v. *Radford* (1863) 9 L.T. 471. See also *per* Lord Cairns in *Shaw* v. *Foster* (1872) L.R. 5 H.L. 340; *Re White Rose Cottage* [1964] Ch. 491; *Paul* v. *Kedar* [1939] 2 All E.R. 737.

[21] It does not seem that the Judicature Acts were regarded as substantially altering the position. See *per* Lord Macnaghten in *Bank of N.S.W.* v. *O'Connor* (1889) 14 A.C. 273, 283 and *per* Maugham J. in *Clayton* v. *Clayton* [1930] 2 Ch. 12, 18. See also *Halsbury's Laws of England*, Vol. 27, p. 317 (p), (q).

[22] See *e.g.*, *Barnard* v. *Bywater* (1868) 17 W.R. 71; *Ratcliffe* v. *Barnard* (1871) L.R. 6 Ch. 652; *Hunt* v. *Elmes* (1860) 28 B. 631; *Mason* v. *Morley* (1865) 34 B. 475. *Coote on Mortgages* (9th ed.), p. 1338.

> "I think there is no doubt that the defendant is entitled to retain the documents. What use she can make of them is a different question. The donor intended and hoped that the possession of the debentures would carry with it the property in them. But that does not alter the effect of the gift of the documents. If the defendant can avail herself of the documents in any way, either by compelling the executors to make a bargain with her or otherwise she is entitled to do so."

In *Re General Providence Assurance Company* [26] the mortgage itself was void as being *ultra vires* the company's articles, but the deeds were not ordered to be delivered up. Again in *Heath* v. *Crealock* [27] Lord Cairns L.C. says [28]:

> "It appears to me to be clear, both upon principle and upon all the authorities which were cited, that it is the practice of the Court of Equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds. But something would be taken away if the title deeds which he has received from one who at the time was holder of them, and the apparent owner of the estate, were taken away. I asked the learned counsel at the bar if they could point out any case where, as against a purchaser for value without notice, the title deeds had been taken; but no such case was produced, and I read the language of the cases cited, in particular in the case of *Hunt* v. *Elmes*,[29] as authority that deeds under these circumstances cannot be taken from purchasers for value without notice."

In *Rummens* v. *Hare* [30] the deceased had given a policy of insurance to the defendant without executing an assignment. The plaintiff administratrix claimed the return of the policy but it was held that the action could not be maintained for though there had been no assignment of the policy and the right to the money secured by it might not be affected, the right to the document itself passed by the gift to the defendant. Lord Cairns L.C. said [31]:

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[23] *Re Richardson* (1885) 30 Ch.D. 396.

[24] (1858) 3 H. & N. 387.

[25] *Ibid.* at p. 389.

[26] (1869) 17 W.R. 514.

[27] (1874) L.R. 10 Ch.App. 22.

[28] *Ibid.* at p. 33.

[29] (1860) 28 B. 631.

[30] (1876) 1 Ex.D. 169. The decision in *Searle* v. *Law* (1846) 15 Sim. 95 was distinguished by Mellish L.J. (at p. 171) because the document there was claimed on the ground that the plaintiff had a beneficial interest under it.

[31] *Ibid.* at p. 171.

> "This is an action, not involving any question with regard to the right to the money secured by the policy of insurance, but for the detention of the paper writing only. I say this because very different considerations apply to proceedings for recovering the security itself, and to proceedings for the recovery of that which is the subject of the security . . . as has been pointed out by the Lord Justice during the argument, the intestate could not have claimed to have the document returned to him, nor can his administratrix now claim it. We have nothing to say as to the money which is secured by it. This is one of those cases in which the plaintiff may not be able to recover the document, which is the evidence of the debt, while the person who holds that evidence may not be able to recover the debt itself; but with that we have nothing to do."

This would appear to be a typical example of the situation created by a lien, which is in essence simply a bargaining situation enabling the person claiming the lien to obtain his demands before he surrenders his possession. The distinction is further remembered where the court refuses to extend Lord Thurlow's doctrine to personalty.[32] Some Canada Railway Bonds were deposited as security for a debt and Jessel M.R. indicated that the plaintiff was in the position of a mere pledgee at law of certain chattels and that a person in that position did not have the same right of foreclosure as a mortgagee by deposit of the title deeds of land. He says[33]:

> "The principle upon which the Court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect, and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on. Then, when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title."

The distinction between the possessory lien or pledge of the title deeds and the title to the land itself is again brought out clearly in the Court of Appeal in *Swanley Coal Co.* v. *Denton*.[34] There a bill of sale affected the title deeds to land and its validity depended upon the question whether it created a charge upon the land or simply upon the deeds as chattels. It was upheld as simply affecting the deeds themselves. Vaughan Williams L.J. says[35]:

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[32] *Carter* v. *Wake* (1877) L.R. 4 Ch.D. 605. However, in *Lodge* v. *N.U. Investment Co.* [1907] 1 Ch. 300 Parker J. seems to have used an analogous equitable principle to prevent the recovery of documents relating to personalty until the loan had been repaid.

[33] *Ibid.* at p. 606.

[34] [1906] 2 K.B. 873. See also *per* Vaughan Williams L.J. in *Thurstan* v. *Nottingham Permanent B.S.* [1902] 1 Ch. at pp. 9, 10 (affirmed on appeal [1903] A.C. 6).

> "Then it is said that we cannot read this instrument in this way, because the deeds so savour of realty that the assignment of this lease together with the muniments of title must have been intended to give an interest in land. That might be a very strong argument if it were a true proposition at law that documents of title cannot be severed from the land, but the decision in *Barton* v. *Gainer*[36] is in my opinion an authority to the contrary. . . . it is of course well known that as a matter of fact deeds are not infrequently handed over not for the purpose of dealing with the subject matter of the deeds but for the purpose of giving the person with whom the deeds are deposited what is called a 'sit upon' title."

Thus at the turn of the century it is reasonably clear that where an equitable mortgage is created by deposit of title deeds the mortgagee has a possessory right to retain the deeds which it is submitted amounts to and is indistinguishable from a possessory lien although that term is not employed.[37]

5. DISCOMFORT

As the twentieth century advances the legal memory of the origins of an equitable mortgage by deposit seems to become blurred. The 1925 legislation does nothing to alter the intrinsic situation, but there is a tendency to construe statute law as being unconcerned with such nice distinctions as possessory lien and equitable mortgage. The Law of Property Act 1925, however, seems to take great care to preserve all existing rights and section 13 provides that the Act shall not prejudicially affect the right or interest of any person arising out of or consequent on the possession by him of any documents relating to a legal estate in land, nor affect any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in land. Section 85 gives the first mortgagee the same right to possession of documents as if his security included the fee simple and paragraph 7 of Part 7 of the First Schedule again reserves rights of mortgagees to retain possession of documents.[38] The real importance of the Act in this context, however, seems to lie in section 97 which excludes from the registration provisions a mortgage protected by the deposit of documents relating to the legal estate affected. This gives statutory importance and great significance to a form of mortgage which as has been seen originated in a very informal way. The Land Registration Act 1925 by section 66 provides an equivalent machinery for mortgage by deposit, substituting the land certificate for the title deeds. This section, although referring to a lien on the registered land, does not seem either to accept or reject the distinction between a lien on the land certificate and an equitable mortgage on the estate. However in *Re White Rose Cottage* [39] Wilberforce J. (as he then was) held that there was only one charge in such circumstances in relation to registered land. He said [40]:

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[35] [1906] 2 K.B. 878.

[36] (1858) 3 H. & N. 387. See p. 184, *ante*.

[37] See *Halsbury's Laws of England*, Vol. 24, p. 143 and *Halsbury's Laws of England*, Vol. 27, p. 817; *Coote on Mortgages* (9th ed.), pp. 86, 98.

[38] See also s. 106 (4).

> "In the first place it seems to me that the charge, and the only charge, is effected by the memorandum and that no second or additional charge was brought about by the deposit. This is in accordance with the principles that where parties have put their arrangement in writing, the terms of the charge are defined by the writing and it would not be admissible to invoke evidence of an intention to create a charge outside the writing—*i.e.* by the fact of deposit or by any agreement to be implied from that fact. For the classic statement of this principle see Lord Cairns in *Shaw* v. *Foster*." [41]

This, however, would not seemingly affect the proposition that a lien on the documents may arise where the agreement so provides, or fails to refer to the deposit, or where there is no written agreement. In *Clayton* v. *Clayton* [42] Maugham J. accepts the proposition that ownership does not necessarily carry with it the right to the deeds and examines the historical position. It seems to be after this date that the real confusion arises. In *Lewis* v. *Plunkett* [43] Farwell J. held that prima facie the person entitled to the beneficial and legal title is entitled also to possession of the title deeds. This is unexceptionable,[44] but the principle was then apparently used to force delivery up of the title deeds contrary, it is submitted, to the general principles and authorities stated above and largely, it seems, on the remote ground (presumably of public policy) that if title deeds get into other hands it may be possible for the person into whose hands they come to use them for improper purposes and to perpetrate frauds on third parties. The Privy Council decision in *Kasumu* v. *Baba-Egbe* [45] again recognises the distinction between the void money-lending transaction and the right to recover the deeds. It does not decide that they are one and the same transaction, but it holds that the ordinance in question covers all the transactions concerned, with the result that the principle in *Lodge* v. *National Union Investment Co. Ltd.*[46] cannot be invoked.

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[39] [1964] Ch. 483.

[40] *Ibid.* at p. 490.

[41] (1872) L.R. 5 H.L. 321, 340.

[42] [1930] 2 Ch. 12.

[43] [1937] Ch. 306.

[44] *Cf.* s. 85 (1) of the Law of Property Act 1925.

[45] [1956] A.C. 539.

[46] [1907] 1 Ch. 300. See note 32, p. 185, *ante*.

6. Extrusion?

A somewhat similar question of statutory construction to that canvassed in *Kasumu* arose in the recent decision of the Court of Appeal in *Re Molton Finance Ltd.*[47] A company raised £15,000 from a firm of stockbrokers on deposit of deeds of land accompanied with a memorandum "to the intent that the same may be equitably charged with the repayment." The charge was void as not being registered under section 95 of the Companies Act 1948 but the stockbrokers claimed a possessory lien on the deeds. In the High Court Pennycuick J. held that, although the lien on the deeds existed[48] and did not itself require registration, it was avoided by the terms of section 95. He said:

> "In the case of a deposit such as the present, the documents of title are deposited for the sole purpose of creating and supporting the charge. The lien, it seems to me, arises and subsists solely in connection with this purpose. I do not see how any lien for the debt can be said to arise independently of the charge. It follows that when the purpose is defeated by avoidance of the charge, the lien is destroyed with the charge. The lien cannot continue to subsist in isolation from the purpose in connection with which it arose. To put it another way; the lien, it seems to me, protects the charge and in contradistinction to the debt, and survives, not until payment of the debt, but until the vacation of the charge. Nothing in this view, I think, is inconsistent with the point which counsel stresses, that the common law lien and the equitable charge are distinct rights."

The Court of Appeal in upholding this decision, however, refuted the contention of Mr. Albery, Q.C., that the lien and the charge both support the debt as two legs support the body. Referring to *Ex p. Whitbread*,[49] *Ex p. Kensington*,[50] *Barnard* v. *Bywater*[51] and *Re General Providence Assurance Company*[52] Lord Denning M.R. says[53]:

> "We have looked into all those authorities, and I must say I think they have no application here. It seems to me that when an equitable mortgage or charge is created by deposit of title deeds, there is an implied contract that the mortgagee or chargee may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge.

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[47] [1968] Ch. 325 C.A. The judgment of Pennycuick J. is unreported.

[48] It had never been suggested that the lien was destroyed by what is now s. 44 of the Supreme Court of Judicature (Consolidation) Act 1925 as being inconsistent with the equitable right and Pennycuick J. took the view that there was no inconsistency between the two rights.

[49] (1812) 19 Ves. 209.

[50] (1813) 2 V. & B. 79, 83.

[51] (1868) 17 W.R. 71.

[52] (1869) 17 W.R. 514.

[53] [1968] Ch. at p. 332.

> When the mortgage or charge is avoided for non-registration then everything which is ancillary to it is avoided also. So this contractual right of retention is avoided too. It seems to me quite impossible to suppose that a separate lien is preserved after the charge has been avoided. In the course of the argument Diplock L.J. put this point to Mr. Albery: 'Take a legal mortgage which has not been registered and is avoided for non-registration. Could the mortgagee claim to have a lien on the deeds?' Mr. Albery hesitated to go as far as to say he had a lien. He suggested that an equitable mortgagee might be in a better position than a legal mortgagee. That would be a strange result, so strange that it cannot be right. I am quite clearly of opinion that there is no separate or independent lien distinct from the charge itself. When the charge itself is avoided by the statute, it follows inexorably that the ancillary right of retention has also gone."

These propositions go much further than those of Pennycuick J. in the High Court and are, it is respectfully submitted, not necessary to the decision in question. For this purpose it was sufficient to say that section 95 destroyed not merely the equitable charge but the possessory lien on the deeds.[54] Lord Denning's judgment goes beyond this in that: (a) it suggests as an explanation for the deposit an implied "contract"; (b) it suggests that such contract does not create a separate legal or common law lien; (c) it attempts to equate the deposit of deeds on a legal mortgage with the deposit of deeds on an equitable mortgage. These propositions, it is respectfully submitted, are not only inconsistent with the cases cited in argument but with the later authorities, including authority of the Court of Appeal indicated above.[55] It is reversing history to suggest that an equitable mortgage presupposes an implied contract of deposit. The opposite is true. The deposit of the deeds implies an equitable mortgage, as the old cases clearly show. Similarly there is ample authority that the lien and the charge are separate. Conversely, however, the ground on which a legal mortgagee obtains the deeds is clearly ancillary to his legal mortgage.[56] The legal mortgagee did not, in historical origin, need the protection of the deeds. He held the legal estate itself, and he held the deeds in consequence of that estate. His need of them was no more and no less than that of any other estate owner. The possessory lien of the equitable mortgagee on the other hand was in origin his primary security and stands in quite a different relationship to the equitable mortgage evolved by

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[54] s. 95 provides that every charge to which the section applies "shall so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company unless . . ."

[55] i.e., *Rummens* v. *Hare* (1876) 1 Ex.D. 169, C.A.; *Swanley Coal Co.* v. *Denton* [1906] 2 K.B. 873; *Heath* v. *Crealock* (1874) L.R. 10 Ch. 22.

[56] A good recent example is afforded by *Capital Finance* v. *Stokes* [1968] 1 W.L.R. 1158 where it was held that the vendor did not obtain a lien because he bargained for a legal charge, a higher interest, which excluded the lien. (Affirmed on different grounds which do not disturb this principle [1969] Ch. 261, 279.)

Lord Thurlow. The judgment of Danckwerts L.J. agrees with that of the Master of the Rolls. He, however, goes on to say: "In my view no question of a common law lien comes in at all. Common law liens are special liens of a particular type which are created by the law for the purpose of public policy really in order to protect persons who do work or perform other services from having to do without the payment to which they are entitled." This appears to refer to particular and not to general liens, and it is to general liens that the argument necessarily referred.[57] It is true that, as Mr. Muir Hunter, Q.C. argued, general liens are discouraged, but it is not, it is respectfully submitted, true that the title deeds "are" the land. If it be said that the lien here was a contractual one then it may well be that the matter becomes one of construction of the contract, but this is not the basis upon which the court appears to have decided the case. The court did not construe an express contract but talked about an implied contract to retain the deeds. It seems to have accepted Mr. Paul Baker's contention that there was nothing in the documents inconsistent with a lien.[58] The position would therefore appear to be that if the judgment of the Court of Appeal is entirely correct the independent possessory lien on deposit of deeds has been completely eliminated despite numerous authorities to the contrary extending over 200 years. Alternatively the wider grounds of the Court of Appeal judgment are indefensible and the narrower ground on which Pennycuick J. decided the case is correct and consistent with the established principles. This would simply mean that as a matter of construction section 95 of the Companies Act 1948 strikes away both Mr. Albery's legs and not, as he contended, one only. If the Court of Appeal judgment is correct in its wider sense the equity originally created by Lord Thurlow in such a contentious context has indeed grown to the size where it has extruded from the legal nest the possessory lien from which it derived its original sustenance. But this, it is contended, is not the case. As so many of the authorities show there are many instances where the survival of the possessory lien at law is legally irrefutable and socially desirable, even to the point where equity has followed the legal doctrine.[59]

7. JUSTIFICATION FOR EXTRUSION

If the contentions submitted above are correct, it remains to consider whether the extrusion of the possessory lien can be justified on grounds other than those given in *Re Molton Finance Ltd.* This appears to raise four separate but inter-related issues:

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[57] A general lien entitles the possessor to retain possession until all claims are satisfied whereas a particular lien can only be exercised for specific charges (not a general balance due). See *Halsbury's Laws of England*, Vol. 24, p. 144.

[58] For an agreement inconsistent with lien, see *Rolls Rasor* v. *Cox* [1967] 1 Q.B. 552.

[59] See note 33, *ante*, p. 135.

(a) What, as a matter of pure construction, does section 95 of the Companies Act 1948 say?

(b) How far can or should the courts interfere with or modify in effect an Act of Parliament?

(c) What general equitable principles apply to enable the lender to make what use he can of his lien?

(d) What broader considerations of policy apply?

(a) As to the first question none of the judges attempted to construe section 95 verbatim. They contented themselves with the proposition that the lien was ancillary to the charge, although Pennycuick J. accepted that the lien as such did not require registration, and counsel for the liquidator did not contend to the contrary. If, however, it be accepted, as contended above, that the lien is not ancillary to the charge but exists independently in its own right, it becomes necessary to look more closely at the relevant words of section 95. These are to the effect that

> " every charge created after the fixed date . . . being a charge to which this section applies shall, so far as any security on the company's property . . . is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar . . . but without prejudice to any contract or obligation for repayment of the money thereby secured . . .
>
> (2) This section applies to the following charges:— . . .
> (*d*) a charge on land, wherever situate, or any interest therein . . .
> (*e*) a charge on book debts of the company. . . ."

Four points seem here to arise. First the charge has to be *created*. If a lien arises by operation of law it is not registrable.[60] Secondly the reference to the instrument " *if any* " presupposes that a charge within the section must be registered even if there is no " instrument." Thirdly the charge is avoided only as against the liquidator and creditors. And fourthly, since none of the other registrable categories applied, the section was confined in the *Molton* case to a charge on land or any interest therein or to a charge on book debts. It must therefore follow that the charge created or evidenced by the memorandum was registrable, that it still survived for limited purposes although not registered, but that the lien, not being a charge on land or book debts, but a right to retain deeds, was not as such registrable. Furthermore since there is nothing in the section to destroy such a right, it is submitted that the lien cannot as a matter of pure construction be regarded as avoided by section 95.

(b) It may, however, be said that to uphold the lien in a case such as *Re Molton Finance Ltd.* would be to modify or defeat the

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[60] See *Brunton* v. *Electrical Engineering Co.* [1892] 1 Ch. 434.

Act or at least the broad intention of the Act. To this approach the narrow argument of pure construction gives no convincing answer. It can only be said that the Act itself indicates no such general intention. It applies to most, but not all, forms of charge or security and there is no discoverable reason for the composition of the compulsory list or the exclusion of other forms of charge. Furthermore, as in most attempts at categorisation there are bound to be borderline cases of definition.[61] It is hard to imagine a right less likely to cause problems of definition than the physical possession of documents of title. In short, to uphold such a lien cannot really conflict with any existing general intention or principle and is unlikely to cause future problems of definition.

(c) To strike a more positive note, if there is no bar to the survival of the lien to be found in the wording of the Act or in the breach of some general principle, is there any reason in equity why the right should be preserved? It is suggested that an affirmative answer can be securely based on the principles that "Equity will not suffer a wrong to be without a remedy" [62] and "Equity looks to the intent rather than to the form." [63] There is a moral wrong involved in depriving a creditor of his possession of documents which may enable him to bargain with the debtor or other—later—creditors.[64] The only additional burden put upon the latter will be an obligation, after checking the register under section 95, to check the possession of its documents of title with the company secretary or auditors. Conversely the simplicity and convenience of security by deposit alone, proved over the experience of 200 years, seems to demand that the simple intention of such a transaction, often of a temporary nature only, should be allowed to prevail without the complications and formalities of company legislation necessarily intruding at every turn. There would no doubt be a certain irony in the equitable principles rescuing a common law possessory right but there are plenty of analogies for the intervention of equity in similar circumstances. One need only mention the Statute of Frauds as affected by the doctrine of part performance, the usury laws as affected by equitable relief,[65] Parker J.'s treatment of the Moneylenders Acts, and the use of the principle of subrogation in equity to qualify some of the rigours of the Infants Relief Act 1874 [66] and the Moneylenders Acts.[67] It is respectfully suggested that there are strong positive grounds in equity for retaining and upholding this possessory lien.

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[61] See for example the discussion upon the distinction between a security and a contract to assign part of a larger debt in *Ashby Warner & Co.* v. *Simmons* [1936] 2 All E.R. 697 (C.A.).

[62] See *Snell's Principles of Equity* (26th ed.), p. 31.

[63] *Ibid.* at p. 43.

[64] See *Lodge* v. *National Union Investment Co.* [1907] 1 Ch. 300, see p. 135, *ante*.

[65] See *Kasumu* v. *Baba-Egbe* [1956] A.C. 539, 549 and p. 137, *ante*.

[66] *Nottingham Permanent B.S.* v. *Thurstan* [1903] A.C. 6.

[67] *Congresbury Motors Ltd.* v. *Anglo-Belge Finance* [1969] 3 All E.R. 545.

(d) So far as the broader considerations of policy are concerned, the primary difficulty stems from section 95 itself. If this section stated a broad principle that all charges affecting the property of a company must be registered and if it were public policy to ensure that any person dealing with the company need never look beyond the register, then the survival of an independent possessory lien might be an unjustifiable anomaly. Such was apparently the position in the *Kasumu* case. This, however, is not the case in English law. The list in section 95 is nowhere suggested either to be exhaustive or merely illustrative. It is quite arbitrary, a mere list of categories. It apparently permits a residue of non-registrable exceptions.[83] Broader considerations of policy therefore seem to demand that so long as there is no general principle applicable to all charges on the property of a company the lender should be allowed as heretofore to make what he can out of any possessory lien he may have.

8. SUMMARY

In these circumstances it is submitted that the true position can be summarised as follows:

(1) Where title deeds are deposited and there is no writing, then two separate rights arise, namely the possessory lien on the deeds and the equitable charge upon the land.
(2) Where there is a deposit of title deeds and an accompanying contract, then the matter is one of construction of the contract.
(3) If in the same circumstances the contract is silent then the position is as in (1) above.
(4) If in any of these cases the transaction is avoided by some statutory provision, then the matter becomes one also of construction of that provision, but there are in principle no obstacles to the courts upholding the lien despite the avoidance of the charge. Conversely there are strong reasons in equity and on broad considerations of policy for upholding the lien.
(5) In other cases, *i.e.* those not affected by statute, the destruction of the equitable charge will not lead to the destruction of the concomitant possessory lien. The latter is, however, like all such liens merely a defence.

Equity, it is submitted, is not a cuckoo nor has it extruded its "legal" kin.

J. H. G. SUNNUCKS.*

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[83] See *Buckley* (13th ed.), p. 206, *Palmer* (21st ed.), p. 412.
* M.A. (Cantab.) of Lincoln's Inn, Barrister-at-Law.

ANIMUS DESERENDI IN CONSTRUCTIVE DESERTION

ALTHOUGH it is clear that an *animus deserendi* is necessary in cases of actual desertion,[1] the situation with regard to constructive desertion is altogether more complex. It is particularly important, it is suggested, to reconsider first principles, as the Divorce Reform Act 1969 would seem to make no difference to the notion of desertion, apart from the reduction of the required period to two years.

Prior to the important and problematical decision in the case of *Lang* v. *Lang*,[2] judicial opinion divided itself into two schools of thought; the objective and subjective, which were described by Denning L.J. in the case of *Hosegood* v. *Hosegood*.[3] He described the subjective school as follows [4]:

> " . . . in constructive desertion, as in actual desertion, a husband is not to be found guilty, however bad his conduct, unless he had, in fact, an intention to bring the married life to an end. This school admits that there are many cases where he may be presumed to have that intention. . . . But this school says if in truth the facts negative any intention to bring the married life to an end, the courts should not attribute it to him."

This view was expressed by Bucknill J. in the earlier case of *Boyd* v. *Boyd* [5] where the learned judge expressly refuted counsel's suggestion that the test was whether the husband had behaved in such a manner that the wife could not be expected to live with him.[6] Bucknill J. said,[7]

> " . . . but, before there can be a case of constructive desertion, the court must be satisfied that the conduct of the husband was such as to show a clear intention on his part to drive the wife away. There must be an intention on the part of the person charged with desertion to bring the cohabitation to an end."

Denning L.J. described the objective test thus,[8]

> " The other school of thought does lip service to the necessity for such an intention, but says that, even if the husband had no intention in fact to bring the married life to an end, yet he is conclusively presumed to intend the natural and probable consequences of his acts and if his conduct is so bad or so unreasonable that his wife is forced to leave him, he must

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[1] See, *e.g.*, *Sickert* v. *Sickert* [1899] P. 278.

[2] [1955] A.C. 402.

[3] (1950) 66 T.L.R. (Pt. 1) 735.

[4] *Ibid.* at p. 738.

[5] [1938] 4 All E.R. 181.

[6] See Divorce Reform Bill, as amended by Standing Committee C, cl. 2 (1) (*b*).

[7] [1938] 4 All E.R. at p. 182.

[8] (1950) 66 T.L.R. (Pt. 1) at p. 739.

> be presumed to have intended her to leave and he is guilty of constructive desertion."

Further authority for this view is to be found in the cases of *Edwards* v. *Edwards*[9] where Lord Merriman P. considered the remarks of Bucknill J. in *Boyd* v. *Boyd* wrong[10] and applied the "natural consequence" test, and *Sickert* v. *Sickert*. In that case, Gorell Barnes J. said[11]:

> "A wife whose husband is carrying on an adulterous intercourse with another woman or other women is not bound to remain in cohabitation with him: she can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connexion complained of, and, if he refuses to do so, a wife with any self respect has only one course to take—that is, to withdraw from cohabitation. The husband in such a case must be taken to intend the consequences of his action—that is to say that his wife shall not live with him."

Denning L.J. himself came down in favour of the first school of thought on the grounds that the courts were not at liberty to grant a divorce "simply because a marriage has utterly broken down."[12] Denning L.J. considered that the views of the first school were "logically unanswerable," for,

> "when people say that a man must be taken to intend the natural and probable consequences of his acts, they fall into error; there is no 'must' about it, it is only 'may.' The presumption of intention is not a proposition of law but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he may foresee them and intend them. But while that is an inference which may be drawn, it is not one which must be drawn. If on all the facts of the case it is not the correct inference then it should not be drawn."[13]

Denning L.J.'s view came under criticism from Professor Goodhart[14] who commented[15]:

> "... it is difficult to see why one school is more logical than the other. If the law can imply a constructive *factum* why can it not equally well imply a constructive *animus*? The presumption of intention then becomes a presumption of law ... and not a presumption of fact, but there are many instances of such presumptions of law which have been accepted without question. Thus in the present instance there is a presumption of

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[9] [1947] P. 268.
[10] *Ibid.* at p. 271.
[11] [1899] P. at p. 283.
[12] (1950) 66 T.L.R. (Pt. 1) at p. 739.
[13] *Ibid.* at p. 738.
[14] (1955) 71 L.Q.R. 33.
[15] *Ibid.* at p. 35.

> law that a husband who has maltreated his wife, has left her although in fact she has left him. It follows that once the courts have accepted the doctrine of constructive desertion then they are not bound by any 'correct inference' of fact: they can imply a constructive animus by reaching the conclusion that there has been constructive desertion. Whether or not they will do so is a question of policy and not of logic."

At first sight, it would appear difficult to disagree with Professor Goodhart's view; the idea of constructive desertion, as with any constructive concept, is an artificial one and it would seem unwise to attempt to discriminate between artificial concepts in the way in which Denning L.J. did in *Hosegood* v. *Hosegood*. However, the real inconsistency, as will later be shown, lies elsewhere and is more fundamental.

There is also a third view which has been expressed by Dr. Rosen [16] who says,

> "Lord Denning's view was that the difference between the two schools amounted to this: that the first school held the presumption of intention to be rebuttable, while the second school asserted it was irrebuttable. It is submitted that if there were two such schools, then neither was correct. As will be shown, in this type of case, the question of intention is beside the point. The solution is the answer to the question—had the complainant just cause for leaving?"

Dr. Rosen, however, does not consider intention to be totally irrelevant, but believes that it attaches rather to the acts themselves than to the consequences. "If we must retain intention," he says,[17] "why is it not sufficient to say that he intended the acts without reference to the consequences?"

The whole problem was considered by the Privy Council in the important case of *Lang* v. *Lang*.[18] In that case, the appellant had struck his wife on repeated occasions and had abused and vilified her. She had separated from him twice before they finally parted and she had warned him that she would leave him if he did not mend his ways. After she had filed her petition for divorce, he wrote her a number of letters begging her to return, but she did not answer them. It was contended for the husband that he did not possess the *animus* necessary for constructive desertion.[19] It was held that on the facts the husband was guilty of constructive desertion. It is important to remember that *Lang* was an appeal from the High Court of Australia and the Supreme Court of Victoria. In Victoria, cruelty is not grounds for divorce, and, therefore, the petition had to be brought on the grounds of constructive desertion. On the facts of *Lang* v. *Lang*, there can be little doubt that the husband's conduct would, in England, have constituted cruelty.[20]

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[16] *Matrimonial Offences* (2nd ed.) at p. 48.
[17] *Op. cit.*, p. 50.
[18] [1955] A.C. 402.
[19] *Ibid.* at p. 406.

Lang v. *Lang* poses its own peculiar problems. As Lord Reid described it in *Gollins* v. *Gollins*,[21] "It is not an easy case. There had to be an agreed judgment and such judgments are not infrequently obscure." In general, the advice of the Judicial Committee seems to accept the objective test as described by Denning L.J. in *Hosegood*, though subject to certain modifications, which add to the complexity of the position. Lord Porter delivering the judgment of the court, expressed the position thus [22]:

> "Prima facie, a man who treats his wife with gross brutality may be presumed to intend the consequences of his acts. Such an inference may indeed be rebutted, but if the only evidence is of continuous cruelty and no rebutting evidence is given, the natural and almost inevitable inference is that the husband intended to drive out the wife. The Court is at least entitled and, indeed, driven to such an inference unless convincing evidence to the contrary is adduced."

Lord Porter went on to say [23]:

> "What legal inference is to be drawn where the whole of the husband's conduct is such that a reasonable man would know—that the particular husband must know—that in all probability it will result in the departure of the wife from the matrimonial home? . . . Where, however, the effect of his actions upon other people is concerned and there is no certainty, but only a high degree of probability, as to what the result will be, is a court to say that if he did entertain an unjustified hope his wife would stay, the intention normally to be inferred from his acts is to be rebutted, and is the correct conclusion that he did not intend to drive her out. In their Lordships' opinion no such conclusion is justified."

In these two passages Lord Porter is considering two separate situations: first, where the conduct is overtly and obviously cruel, and, secondly, where the conduct is something less. In the first instance, he suggests, both here and in a later passage,[24] that the respondent's actual *intention* may well be of some relevance. In the second, Lord Porter is not concerned with his *desire*, which he suggests is a matter irrelevant.

Lord Reid in *Gollins* v. *Gollins* oversimplified the problem.[25] "So the decision was that if without just cause you persist in doing things which you know your wife would probably not tolerate and which no ordinary woman would tolerate, and then she leaves, you have wilfully deserted her whatever your desire or intention may have been." This is a particularly obscure passage. In considering the conception of desertion itself, Lord Reid refers to "wilfully deserted," leaving aside the question of intention to desert. Whether "wilfully" is synonymous with "intentionally" is not made clear, as he specifically states that actual intention is irrelevant. Further, it is suggested that *Lang* v. *Lang* decided nothing so simple. This is made clear by Professor Goodhart,[26] who says,

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[20] Certainly after the decision in *Gollins* v. *Gollins*.

[21] [1964] A.C. 644, 666.

[22] [1955] A.C. at p. 428.

[23] *Ibid.* at p. 429.

[24] *Ibid.* at p. 430. See, *infra*, Professor Goodhart's comments thereon.

[25] [1964] A.C. at p. 666.

> "The Judicial Committee has, however, left a problem to be solved in future cases by refusing to accept the objective test in full. It was held that in such a case 'the appellant must have known what he was doing would necessitate her withdrawal' and that he 'must have recognised the gravity of the effect of his behaviour though he hoped and desired that it would not have its natural result.'[27] It has therefore adopted a more subjective standard, but it is not entirely clear why this compromise between the two conflicting schools has been adopted. Is it still open to a husband to prove that he was so obtuse and insensitive that he had failed to recognise the gravity of the effect of his behaviour, although a reasonable man in his circumstances would have done so? . . . There seems no obvious reason why the constructive *animus deserendi*, which is otherwise based on an objective standard, should be limited by a subjective element in this particular regard."

Lord Porter's view has been criticised by Dr. Rosen[28] who considers that Lord Porter has failed to analyse the nature of the requisite intention sufficiently closely. Dr. Rosen points out that the intention of the respondent must, if one follows Lord Porter, be to drive the petitioner away. However, Dr. Rosen quotes the situation where the husband beats his wife because he enjoys seeing her suffer and keeps her locked in the house so that he can enjoy his sadism. Surely, Dr. Rosen suggests, his intention is not to drive her away but to keep her in. Dr. Rosen's postulation would seem somewhat artificial, in that those particular circumstances the wife's petition would normally be based on cruelty. Lord Porter commented on the nature of conflicting intentions,[29]

> "Their Lordships . . . venture to question whether as a matter of strict terminology, a man may be said to entertain conflicting 'intentions.' A man may well have incompatible desires. He may have an intention which conflicts with a desire, *i.e.* he may will one thing, and wish another, as when he renounces some cherished article of diet in the interest of his health. But 'intention' necessarily connotes an element of volition: desire does not."[30]

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[26] (1955) 71 L.Q.R. 32, 36.

[27] [1955] A.C. at p. 430.

[28] *Op. cit.*, p. 50.

[29] [1955] A.C. at p. 428.

[30] In general terms, this view is approved by Smith and Hogan (*Criminal Law*, p. 36) in preference to that expressed in the decisions of *R.* v. *Steane* [1947] K.B. 997 and *R.* v. *Ashley* [1915] 1 K.B. 616. But see below.

The field is, however, fraught with semantic difficulty. For example, Smith and Hogan suggest [31] that, in criminal law, it may be possible to entertain conflicting intentions. "Suppose D takes P's loaf in order to feed his starving children. Can it be denied that he intends permanently to deprive P of the loaf? Yet his dominant intention is to feed the children." Dr. Rosen is concerned by the apparent conflict between an actual intention (*i.e.* to keep the wife in) and an inferred [32] intention (*i.e.* to drive the wife out). It is suggested that this particular fact situation does not fall within the province of constructive desertion, but rather within that of cruelty. Constructive desertion, as its name implies, involves a separation and is specifically concerned with "expulsive" conduct.[33]

In general terms, however, it is suggested that Lord Porter's view is more nearly correct. Apparently conflicting intentions may really be an *intention* to do something, with a *motive* to achieve something else. Hence in the situation postulated by Smith and Hogan, the intention to deprive is called an intention because it is legally relevant, but the motive (*i.e.* to feed the children) is something which is usually not legally relevant.[34]

In Dr. Rosen's example, therefore, we would say that the husband intended to inflict injury upon the wife, but also intended to pursue a course of conduct the *effect* of which would be to drive her out, an effect which he most probably knew and was trying to prevent by keeping her in. Indeed, one can infer that knowledge from the very act of locking the wife in. If she does escape, it is difficult not to say that he had not pursued a course of conduct deliberately in full knowledge of its inevitable consequences (*i.e.* the wife's departure).

It is important to distinguish between an inferred intention, that is, an intention drawn from an examination of the respondent's action and *imputed* intention. That is, whether the respondent ought reasonably to have foreseen the consequences of his acts, and, if so, he must be assumed to have intended them, even though, in fact, he did not. Both these categories imply that some kind of reality, also a further intention, but it is designated a motive, intention is an essential component of constructive desertion.

Various solutions have been suggested to this particularly complex problem. Professor Goodhart suggests [35] ". . . that the *animus* need not be a true one. There is an irrebuttable presumption that the respondent, who has made home life unbearable for the wife, has intended to bring the matrimonial relationship to an end. The window dressing as to intention is immaterial." He goes on to suggest that this view [36] would produce both a rational result and a much to be desired simplicity. "Once the act can be shown to be intentional, which ought to give little or no difficulty except in the case of insanity, the further test ought to be unrelated to the respondent's intention, it would be limited to the foresight of a reasonable man." Dr. Rosen goes further, when he says [37] "It is better to abandon intention altogether than to impute to a wrongdoer an intention he has not got." It has been suggested, in fact, that since intention is no longer relevant in cases of cruelty, it is no longer applicable in cases of constructive desertion either.[38] It is suggested that cruelty and constructive desertion are essentially rather different fact situations. Constructive desertion is an artificial concept, which, by its very name is analogous to desertion rather than to cruelty. Hence, it would seem more satisfactory to apply the components of actual desertion to constructive desertion rather than those of cruelty.

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[31] *Ibid.* at p. 86.

[32] Or, in this case, *imputed* too, possibly.

[33] *Viz.*, *Buchler* v. *Buchler* [1947] P. 25.

[34] *Viz.*, *Chandler* v. *D.P.P.* [1962] 3 W.L.R. 694.

[35] (1963) 79 L.Q.R. 94, 112.

[36] *Ibid.* at p. 116.

The key to the whole problem lies, it is suggested, in the word "wrongdoer" as used by Dr. Rosen. It is clear that an *animus deserendi* is essential in the case of actual desertion,[39] so much is admitted even by Dr. Rosen.[40] The essence of actual desertion is that it is an offence, a fault, and it is the presence of an intention which supplies the element of culpability which makes an act or a course of conduct a fault or offence. Constructive desertion is a correlative situation and, hence, it would seem anomalous if one situation required an intention and the other did not.

Whilst bearing in mind the statement of Lord Hodson in the important case of *Williams* v. *Williams*,[41] who said, "I cannot accept the argument that divorce is partly punitive and should, therefore, look to the criminal law for guidance," the experience of the criminal law can be of some help as certain terminology is common to each. "*Mens rea*" is an essential element of the criminal *offence*,[42] and just as the criminal law is concerned with the apportionment of blame, so is divorce law. Admittedly, constructive desertion is an artificial and anomalous situation in some respects, but that is no reason for extending the anomaly by dispensing with the element of intention.

Establishing the presence of intention in constructive desertion is, of course, rather more difficult than in cases of actual desertion. Even in cases of actual desertion the establishment of intention is very much a matter of inference from particular facts. In constructive desertion, it is, as we have seen, even more so. Dias [43] interprets the decision in *Lang* v. *Lang* as follows, "Constructive desertion requires an intention to drive the other out of the matrimonial home. But all that suffices is that one party should do an act, which he as a reasonable person ought to realise would inevitably drive the other out. An intention to drive out is then imputed objectively." Dias here writes of intended *consequences* rather than intended *acts*,[44] the consequences being the departure of the petitioner from the matrimonial home and the end of the matrimonial relationship.

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[37] *Op. cit.*, p. 58.

[38] *Viz.*, *Gollins* v. *Gollins*.

[39] *Ante*.

[40] *Op. cit.*, p. 47.

[41] [1964] A.C. 698, 752.

[42] But see: Edwards, *Mens Rea in Statutory Offences* and Baroness Wootton of Abinger, *Crime and the Criminal Law* (1964), Hamlyn Lectures.

[43] *Dias on Jurisprudence* (2nd ed.) at p. 268.

Dias is correct, too, it is suggested, when he says that intention to effect inevitable consequences will normally be imputed. Indeed, when the conduct of the respondent is such that its consequences can be regarded as inevitable, it will usually be reasonable to *infer* such an intention from an observation of the conduct itself. To place a higher standard of foresight on the respondent[45] is likely to cause further problems and to plunge the situation even further into the metaphysic mire. Conduct which could be considered " grave and weighty "[46] would normally give rise to the inference of intention, and it is certainly true to say that the more serious the conduct the more readily will the courts deduce the intention.

The intention to be inferred in cases of constructive desertion may, because of the nature of the idea, possibly be different from that required in cases of actual desertion. In the constructive desertion situation, it is not the respondent who leaves and the *animus* is not, in a sense, a real one. The intention may be deemed, for the purposes of the idea, to be, as Dias said,[47] " to drive the other out of the matrimonial home."

The crucial case of *Lilley* v. *Lilley*[48] decided that the respondent must depart with an intention to bring the relationship permanently to an end. This element of permanence is a major contributant to the element of blameworthiness which makes desertion, both actual and constructive, an offence. The position is, however, likely to be different with regard to constructive desertion, for constructive desertion arises from an entirely different factual situation. It is the innocent spouse who has taken the step of setting up a separate existence, in constructive desertion, and, in most cases, the *actual* intention of the respondent will be much more difficult to ascertain. In cases of actual desertion, knowledge of probable consequences can much more easily be inferred from conduct, and the completion of the offence will be achieved by a course of conduct designed to achieve those consequences. Professor Brett has described this as the *purposive* aspect of the concept of intention. As he has described it,[49] "Another type of intention statement is encountered when we ask a question in the form 'Why did you do that?' expecting an answer which will state a reason *i.e.* some objective which the actor hoped to achieve." In the case of a simple expulsion the intention can be of that kind, but this is the least common constructive desertion situation. In the "course of conduct" cases, the position is, inevitably, less precise. In these cases, it is suggested, the courts will be considering whether the inevitable consequences of the acts have been appreciated and that the course of conduct was persisted in despite that awareness. If, for example, the respondent is incapable of appreciating the inevitable consequences of his acts, then the courts will not infer the intention.

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[44] Compare Goodhart's view, *ante*.

[45] *e.g.*, would be likely to drive the other out *or* would reasonably foreseeably drive the other out.

[46] Though it must be remembered that such an intention will not be imputed as a matter of *law*, it is dependent on the actual facts of the case. *Cf.* Lord Reid in *Gollins* v. *Gollins* [1964] A.C. at p. 664.

[47] *Ante*.

[48] [1960] P. 158.

Though, as has been seen, the question of intention is largely a matter of inference, the courts may be willing to *impute* one particular element. In cases of actual desertion, the intention to bring the relationship *permanently*[50] to an end will be only too apparent,[51] in the constructive desertion situation it will generally be less so. The respondent may be aware that the particular course of conduct he is pursuing will inevitably drive the petitioner out, but his mind is seldom diverted to the permanent effects of his actions. In other words, the respondent does not consider that his conduct will lead to the other spouse's permanent departure and, in most cases, would certainly not choose this result. Hence, it is this aspect which would seem to be imputed—that is, that the respondent had knowledge of the inevitable permanent effects of his conduct. It would appear, too, that the *animus* required for constructive desertion is a subjective one. As Lord Reid put it in *Gollins*,[52] "In matrimonial affairs we are not dealing with objective standards, and it is not a matrimonial offence to fall below the standards of the reasonable man (or the reasonable woman)." Similarly, Diplock L.J. said in *Hall* v. *Hall*,[53] "Secondly, there is the question of *animus*, namely, that *this* husband must have known that *this* wife would in all probability not continue to endure his conduct if he persisted in it." Though in the leading case of *Lang* v. *Lang*, Lord Porter, after having rejected the purely objective test laid down in *Bain* v. *Bain*[54] stated[55] that the test was ". . . that the appellant must have known that what he was doing would necessitate her withdrawal if she acted as any reasonable creature would." Lord Porter, then, is suggesting that the test is rather more objective than that enunciated by Diplock L.J.

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[49] Peter Brett, *An Enquiry into Criminal Guilt*, at p. 88.

[50] See *Lilley* v. *Lilley*, *ante*.

[51] See *e.g.* *Walsh* v. *Walsh* (1919) 122 L.T. 463 and *Davis* v. *Davis* (1920) 122 L.T. 795.

[52] [1964] A.C. at p. 664.

[53] [1962] 1 W.L.R. 1246, 1256.

[54] (1923) 33 C.L.R. 317.

[55] [1955] A.C. at p. 490.

It is submitted that Diplock L.J.'s view is to be preferred, since a subjective test would better accord with the idea that intention in relation to constructive desertion is a matter of inference rather than imputation. Furthermore, in a context in which blame is being apportioned it would seem undesirable to apply the standard of the reasonable man.

CONCLUSIONS

(1) An *animus deserendi* is an essential component of constructive desertion.

(2) Such an intention will normally be inferred where the respondent's conduct was such as would inevitably cause the petitioner to leave the matrimonial home.

(3) The standard to be applied is a subjective one.[54]

FRANK BATES.*

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STATEMENTS OF REASONS FOR JUDICIAL AND ADMINISTRATIVE DECISIONS

A. The General Rule

The general rule is that there is no duty to state reasons for judicial or administrative decisions.[1] A statement of reasons is not required by the rules of natural justice,[2] and therefore there is no duty to state reasons for the decisions of courts,[3] juries,[4] licensing justices,[5] administrative bodies and tribunals[6] or domestic tribunals.[7]

Even in the days before the Jervis Acts of 1848, justices of the peace were never required to state reasons for their decisions.[8] The record which was returned to the King's Bench in certiorari proceedings contained the document which initiated the proceedings, the pleadings (if any), the evidence (only in criminal cases), and the adjudication, but not the reasons, unless the justices chose to state them.[9] Since inclusion of the adjudication in the record was compulsory but inclusion of the reasons was not, it follows that a statement of reasons did not form a necessary part of the adjudication.

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[1] The authorities are reviewed in *Pure Spring Co. Ltd.* v. *Minister of National Revenue* [1947] 1 D.L.R. 501, 533–539. See also the cases cited below, notes 2–9.

[2] *Fountaine* v. *Chesterton*, *The Times*, August 20, 1968.

[3] *Re Ross and Board of Commissioners of Police for Toronto* [1953] 3 D.L.R. 597, 602; *R.* v. *Wybourn*, *The Times*, January 21, 1969. See also note 8, below.

The position may be different where a judge exercises a judicial discretion (as opposed to an administrative discretion), according to *Ex p. Merchant Banking Co. of London, re Durham* (1881) 16 Ch.D. 623, 635, as interpreted in *Pure Spring Co. Ltd.* v. *Minister of National Revenue* [1947] 1 D.L.R. 501, 533, 545 and *Hawkins* v. *North of Scotland Canadian Mortgage and General Investment Trust Ltd.* [1939] 4 D.L.R. 436, 443. But it is arguable that the Canadian cases misinterpret *Re Durham*. What Jessel M.R. said in that case was that a Chancery judge exercising a judicial discretion (approving a composition with creditors) must "investigate the objections brought before him to the proposed arrangements, and . . . give his opinion on them judicially, of course, and with sufficient reasons." This may only mean that the judge must have sufficient reasons, not that he need state them; a few lines later Jessel M.R. defined a judicial discretion as "a discretion founded on sufficient reasons." In *Grimshaw* v. *Dunbar* [1953] 1 Q.B. 408 a county court judge exercised a judicial discretion without stating reasons; his decision was reversed by the Court of Appeal, but no objection was taken to his failure to state reasons.

[4] *Ex p. Harrington* (1888) 4 T.L.R. 435, 437.

[5] *Ibid.* See also note 8, below.

[6] *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* [1947] A.C. 109, 123; *Re Ross and Board of Commissioners of Police for Toronto* [1953] 3 D.L.R. 597, 602; *Davies* v. *Price* [1958] 1 W.L.R. 434, 440 (C.A.).

[7] *Ex p. Penney* (1872) L.R. 8 Ch. 446; *Fountaine* v. *Chesterton*, *The Times*, August 20, 1968.

[8] *R.* v. *Inhabitants of Audly* (1699) 91 E.R. 443; *Inhabitants of South Cadbury* v. *Inhabitants of Braddon* (1710) 91 E.R. 515; *R.* v. *Inhabitants of Bedel* (1737) 95 E.R. 245, 246. Although these were civil cases, there is no indication that the rule was different in criminal cases; in *Inhabitants of South Cadbury* v. *Inhabitants of Braddon* the King's Bench said: "the justices are not bound to express the reason of their judgment in the judgment, *no more than other courts* . . ." (italics added).

The rule that reasons need not be stated at the time of a judicial or administrative decision is reinforced by the rule that members of a tribunal cannot be compelled, during subsequent litigation, to give evidence about the reasons for their decision.[10]

B. GROUNDS AND REASONS

When a decision can only be taken on a finite number of *alternative* grounds, fixed by law, there is authority for holding that the decision must indicate which of the *grounds* forms the basis of the decision, even though no *reasons* need be stated for the decision. The distinction between grounds and reasons may be made clearer by the following example. Magistrates do not have an unlimited discretion to imprison; they may only imprison someone for committing one or more of a number of offences which are defined by law and which they are given jurisdiction to try. Their judgment must indicate the offence for which sentence of imprisonment is imposed, even though it need not state the magistrates' reasons for finding the accused guilty of that offence (*e.g.* the reasons why the magistrates believed the prosecution's evidence and not the accused's evidence).

There are two particular contexts in which the courts have arrived at this conclusion.[11] It is uncertain how far such examples reflect a general principle, because the *ratio decidendi* of each case was usually limited to the particular facts; in other cases, where statutes conferred powers of administrative decision which could be exercised on alternative grounds, the administrative decisions stated the grounds relied on, so that no dispute arose on this score.[12]

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[9] *Per* Denning L.J. in *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 352. See also Fitzgerald and Elliott, "Certiorari: Errors of Law on the Face of the Record" (1963–64) 4 *Melbourne University Law Review* 552, 574.

[10] *Ward* v. *Shell-Mex and B.P. Ltd.* [1951] 2 All E.R. 904 (administrative tribunal); *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872) L.R. 5 H.L. 418, 462 (arbitrator). It is uncertain to what extent this immunity is enjoyed by officials who do not exercise judicial functions. In *Green* v. *Garbutt* (1912) 28 T.L.R. 575 it was held that a policeman, defending an action for false imprisonment, was obliged to supply further and better particulars about his reasons for suspecting the plaintiff of having committed a felony. The House of Lords distinguished this case in *Liversidge* v. *Anderson* [1942] A.C. 206 (internment by Home Secretary under wartime emergency legislation) by giving an extensive interpretation of the wartime legislation. It is submitted that the House of Lords could have refused the plaintiff's application for further and better particulars in *Liversidge* v. *Anderson* on a different ground, *viz.*, the difference between the *status* of the Home Secretary and the *status* of a policeman; in other words, the House of Lords could have held that the Home Secretary, when exercising *any* type of statutory power, was not obliged to give reasons for his decision, because his decision (unlike the act of a police constable) shared the same presumption of validity as the decision of a competent court or administrative tribunal.

[11] Habeas corpus and false imprisonment cases can be regarded as a third context in which the courts have insisted upon a statement of the grounds for the decision. Arguably, such cases could be distinguished as being based on the Petition of Right (3 Car. 1, c. 1), which provides that "no person shall be imprisoned or detained without cause shewn, or without being charged with something to which he may make an answer according to law." (See also R.S.C., Ord. 54, r. 7 (1).) But, with the exception of warrants issued by the

Licensing cases

In *R.* v. *Sykes*,[13] a statute provided that " no application for a certificate . . . in respect of a licence to sell . . . beer . . . shall be refused, except upon one or more of the following grounds. . . ." Four grounds were then listed; if the application was refused on the fourth ground, reasons had to be given in writing.[14] The justices did not state the ground on which they rejected the application, and the Divisional Court issued mandamus to compel them to hear and determine in accordance with law. Mellor J. said: " The justices may not be obliged to state the reasons which have induced them to refuse the licence on one of the four grounds . . . ; but . . . they ought to state on which of the four grounds . . . they refused the licence, in order to justify their decision, and shew that they were acting within their jurisdiction." Quain J. said: " The legislature has expressly enacted that such a licence as this shall be refused on four grounds only. The justices, by . . . refusing to state on which of the grounds they acted, might practically evade the enactment altogether, and refuse licences arbitrarily and on other grounds than the four mentioned in the section." Quain J. also placed some reliance on the fact that failure to state the ground relied upon might lead to evasion of the requirement that reasons had to be stated if the decision was taken on the fourth ground; but it is clear that this factor was not the *ratio decidendi* of *R.* v. *Sykes*, since mandamus was issued in another case where it appeared from the surrounding circumstances that the decision had not been taken on the fourth ground.[15]

R. v. *Sykes* was followed in a number of other cases on the same statutory provision at the end of the nineteenth century.[16]

King or his Council, the rule requiring a statement of the grounds (not reasons) for detention existed at Common Law: *Hinde's Case* (1577) 4 Leo. 21; *Howel's Case* (1587) 1 Leo. 70; *Codd* v. *Turback* (1615) 3 Bulst. 109.

[12] *e.g.*, *R.* v. *Agricultural Land Tribunal, ex p. Davies* [1953] 1 W.L.R. 722; *R.* v. *Agricultural Land Tribunal, ex p. Grant* [1956] 1 W.L.R. 1240; *R.* v. *Agricultural Land Tribunal, ex p. Bracey* [1960] 1 W.L.R. 911; *Evans* v. *Roper* [1960] 2 All E.R. 507.

[13] (1875) 1 Q.B.D. 52. See also *R.* v. *Ashton-under-Lyne Justices* (1873) 37 J.P. 85.

[14] 32 & 33 Vict. c. 27, s. 8, re-enacted in the Licensing Act 1964, s. 12 (6).

[15] *R.* v. *Lancashire JJ., ex p. Tranter* (1887) 3 T.L.R. 678.

[16] *Ibid.*; *R.* v. *Thomas* [1892] 1 Q.B. 426. In *Ex p. Smith* (1878) 3 Q.B.D. 374, the Divisional Court followed *R.* v. *Sykes*, even though the applicant had not asked the justices at the original hearing to state the ground of their decision. *Ex p. Smith* was described *obiter* as " somewhat peculiar " in *Ex p. Gorman* [1894] A.C. 23, 28, where the correctness of *R.* v. *Sykes* was left

Mandamus to reinstate holders of freehold offices

The original function of mandamus was to reinstate holders of freehold offices who had been illegally removed, and for many years this continued to be one of its main functions.[17] If, as was usually the case, the holder of the freehold office could only be removed for cause, a good return to the writ of mandamus had to specify the cause of removal.[18] On the other hand, if the holder could be dismissed at pleasure, it was a sufficient return to say so.[19]

Analytically, removal for cause must mean removal for breach of one or more of the office-holder's duties, as defined by law. In other words, it is a power of removal which can be exercised on alternative grounds; but the ground on which it is exercised must be stated. Consequently, even though mandamus has scarcely ever been used as a remedy for dismissal from public offices since the abolition of freehold offices, the principles laid down in the mandamus cases are still relevant to public office-holders who can only be dismissed for cause. (In the private law of master and servant, dismissal for cause need not be accompanied at the time by a statement of the cause relied upon [20]; but, "if an employer in his defence to an action for wrongful dismissal alleges misconduct on the part of the servant as justifying dismissal and the servant wishes to obtain information as to the instances of misconduct upon which the employer relies, . . . the servant should apply for an order for further and better particulars of the defence . . ." [21].)

C. STATUTORY DUTY TO STATE REASONS

A duty to state reasons was imposed by the Tribunals and Inquiries Act 1958 on a large number of statutory tribunals, and on Ministers notifying decisions after the holding of a statutory inquiry or in cases where the person affected by the decision could have required the holding of a statutory inquiry.[22] In such cases "... it shall be

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open; nevertheless, all these cases still appear in *Halsbury's Laws of England* (3rd. ed.), Vol. 22, p. 554, as an accurate statement of the present law.

[17] On the early history of mandamus, see Edith G. Henderson, *Foundations of English Administrative Law* (1963), pp. 46–82, 117–142.

[18] *R.* v. *Mayor of Liverpool* (1759) 2 Burr. 723, 731.

[19] *Dighton's Case* (1670) 1 Sid. 461; 1 Vent. 77. *Cf. Prin's Case* (1663–64) 1 Keb. 520, 686.

[20] F. R. Batt, *The Law of Master and Servant* (5th ed. by G. J. Webber, 1967), p. 100.

[21] *Halsbury's Laws of England* (3rd ed.), Vol. 25, p. 521. *Cf.* G. Ganz, "Public Law Principles Applicable to Dismissal from Employment" (1967) 30 M.L.R. 288, 290. For a similar situation in company law, see *Buckley on the Companies Act* (13th ed., 1957), pp. 176–177.

[22] 6 & 7 Eliz. 2, c. 66, s. 12 (1). The duty does not apply to ministerial decisions in connection with orders and schemes of a legislative character. Where the duty applies, a statement of reasons may still be refused or restricted by the tribunal or Minister on grounds of national security; and it may also be withheld in the interests of a party to the decision if it is asked for by someone not primarily concerned with the decision. Orders may be made after consultation with the Council on Tribunals excluding particular classes of decisions from the scope of s. 12; such orders have been rare (H. W. R. Wade, "The Council on Tribunals," [1960] P.L. 351, 357).

the duty of the tribunal or Minister to furnish a statement, either written or oral, of the reasons for the decision if requested, on or before the giving or notification of the decision, to state the reasons." The statement of reasons is deemed to form part of the record.[23] The Act is not the first example of a statute imposing a duty to state reasons,[24] but it is far more comprehensive than anything which had gone before.

The degree of detail required in a statement of reasons was discussed by Megaw J. in *Re Poyser and Mills' Arbitration*:

> "The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised. . . . I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked." [25]

If the statement of reasons is ambiguous or apparently contradictory, the courts will try to resolve the difficulty through the ordinary rules of interpretation [26]; if that is impossible, the statement of reasons will be held not to comply with the statute.[27]

Mandamus lies to enforce a statutory duty to state reasons.[28] Alternatively, the decision itself can be attacked for failure to state reasons. The failure does not make the decision void, but only voidable, and it cannot be treated as a nullity in collateral proceedings [29]; but an arbitral award which ought to contain reasons and does not do so can be set aside for error of law on the face of the record,[30] and, in proceedings under section 179 of the Town and Country Planning Act 1962, a decision which failed to state reasons could be quashed on the grounds that the applicant's interests had been substantially prejudiced by a failure to comply with the relevant requirements of the Act.[31]

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[23] s. 12 (3).

[24] For examples of previous enactments, see the Public Worship Regulation Act 1874, s. 9; and the Town and Country Planning General Development Order 1950, r. 5 (9).

[25] [1964] 2 Q.B. 467, 478. See also *Westminster Bank Ltd.* v. *Beverley Borough Council* [1969] 1 Q.B. 499, 508, *per* Donaldson J., where the duty to state reasons was required by the Town and Country Planning (Inquiries Procedure) Rules 1965. It appears from the Canadian case of *de Marigny* v. *Langlais* [1948] 2 D.L.R. 801, 807 that a full statement of reasons will be adequate notwithstanding that it is made in a form other than that which is required by statute; see also *R.* v. *Ashton-under-Lyne JJ.* (1873) 37 J.P. 85; *R.* v. *Cumberland JJ.* (1881) 8 Q.B.D. 369.

[26] *Earl of Iveagh* v. *Minister of Housing and Local Government* [1964] 1 Q.B. 395, C.A.; *Parrish* v. *Minister of Housing and Local Government* (1961) 59 L.G.R. 411, 418; *William Boyer & Sons Ltd.* v. *Minister of Housing and Local Government* (1968) 67 L.G.R. 374.

[27] *Givaudan* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 250; *R.* v. *Industrial Injuries Commissioner, ex p. Howarth* (1968) 4 K.I.R. 621, C.A.

[28] *Parrish* v. *Minister of Housing and Local Government* (1961) 59 L.G.R. 411, 418; *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303. See also *R.* v. *Medical Appeal Tribunal, ex p. Gilmore* [1957] 1 Q.B. 574; *Earl of Iveagh* v. *Minister of Housing and Local Government* [1964] 1 Q.B. 395, 410. But mandamus is a discretionary remedy, and in *Ex p. Woodhouse* [1960] C.L.Y. 140; *The Times*, June 18, 1960, the Divisional Court refused to issue mandamus (without stating reasons!).

[29] *Brayhead (Ascot) Ltd.* v. *Berkshire County Council* [1964] 2 Q.B. 303. It is uncertain whether the same consequences attach to a failure to state grounds,

If the reasons stated disclose an error of law, the decision can be quashed or reversed.[32] However, where two reasons are stated, and one is bad and the other good, then the decision will be valid, provided that the reasons are independent, not cumulative, and can be severed from each other.[33]

D. VOLUNTARY STATEMENTS OF REASONS

Where a public body or tribunal is not required to state reasons for its decisions, but nevertheless elects to do so, its decisions can be challenged if the voluntary statement of reasons discloses an error of law. In *Padfield* v. *Minister of Agriculture*,[34] the House of Lords decisively rejected the notion that the absence of a duty to state reasons precluded the court from investigating the validity of reasons stated voluntarily.

Nevertheless, there are circumstances in which the absence of a duty to state reasons makes it harder to challenge errors of law contained in a (voluntary) statement of reasons:

(i) In certiorari cases, the court can only look at errors of law on the face of the record (unless the defect goes to jurisdiction). Where the Tribunals and Inquiries Act imposes a duty to state reasons, the statement forms part of the record.[35] But where there is no such duty, it may be uncertain whether the statement forms part of the record, especially if it is handed down separately from

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as opposed to reasons (see above, pp. 155–157; compare *R.* v. *Thomas* [1892] 1 Q.B. 426 and Amnon Rubinstein, *Jurisdiction and Illegality* (1965) pp. 109–116, 178–181, with Rubinstein, *op. cit.* pp. 103–104.

[30] *Re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467.

[31] *Givaudan* v. *Minister of Housing and Local Government* [1967] 1 W.L.R. 250; *Westminster Bank Ltd.* v. *Beverley Borough Council* [1969] 1 Q.B. 499, 508. Failing to state reasons was never regarded as making the decision *ultra vires* (*ultra vires* being the alternative ground of attack under s. 179).

[32] *R.* v. *Minister of Housing and Local Government, ex p. Chichester R.D.C.* [1960] 1 W.L.R. 587 (certiorari); *Birmingham Corporation* v. *Minister of Housing and Local Government and Habib Ullah* [1964] 1 Q.B. 178 (appeal on point of law).

[33] *De Marigny* v. *Langlais* [1948] 2 D.L.R. 801, 805; *Earl of Iveagh* v. *Minister of Housing and Local Government* [1961] 3 All E.R. 98, 104; *R.* v. *Deputy Industrial Injuries Commissioner, ex p. Moore* (the unreported decision of the Divisional Court, which was affirmed on other grounds by the Court of Appeal, is quoted in the Court of Appeal's judgment [1965] 2 W.L.R. 89); *Paultons Square Properties Ltd.* v. *London County Council* (1965) 63 L.G.R. 168, D.C. *Cf. R.* v. *Cambridge* (1788) 2 T.R. 456.

[34] [1968] A.C. 997.

[35] See above, note 28.

the actual decision.[36] However, it seems that errors admitted in the face of the court form part of the record.[37]

(ii) In *Davies* v. *Price*,[38] a tribunal was required to take two factors into account. Its voluntary statement of reasons showed that it had taken one factor into account, but said nothing about the other factor. The Court of Appeal held that it could not be inferred from the silence of the tribunal that the second factor had not been taken into account. On the other hand, if there had been a duty to state reasons, failure to mention the second factor would indicate either that the tribunal had not considered the second factor, or else that the statement of reasons was inadequate—and in either case the tribunal's decision would have been voidable.

(iii) If there is no duty to state reasons, it may be hard to prove that a fact referred to in the decision constitutes a reason for the decision, and even harder to prove that it constitutes the *only* reason for the decision; and, as we have seen, where a decision is based on alternative reasons, it will not be invalid if only one of the reasons is bad.[39] Thus, in *Pure Spring Co.* v. *Minister of National Revenue*, the Minister's letter had referred in passing to an irrelevant fact; Thorson P., after indicating that this did not necessarily mean that the Minister had taken the fact into account when reaching his decision, went on to say: "Even if he did take it into account as a fact, I see no reason for holding that this vitiates his decision when it is quite clear [40] that he had before him many other facts and considerations on which he could properly form his opinion." [41] However, if there had been a duty to state reasons, the Minister could not have argued that there were other facts to justify his decision without admitting in effect that his decision was voidable for failure to state reasons.[42]

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[36] S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed. 1968), p. 417; Fitzgerald and Elliott, "Certiorari: Errors of Law on the Face of the Record," 4 *Melbourne University Law Review* 1963–4, 552, 566 *et seq.*; Abel, "Materials Proper for Consideration in Certiorari to Tribunals," 15 *University of Toronto Law Journal* 1963–4, 102, 118; Anderson's case note on *Ex p. Shaw* in [1951] *University of Queensland Law Journal* 50, 51–2. Note that there is nothing to prevent oral statements forming part of the record; see above, p. 158, and below, p. 162 (*pace* de Smith's case note on *Ex p. Shaw* in (1951) 14 M.L.R. 207, 210).

[37] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 354, 355; S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968), p. 419, note 1; de Smith's case note on *Ex p. Shaw*, (1952) 15 M.L.R. 217, 218–219.

[38] [1958] 1 W.L.R. 434, 440 (C.A.). Proceedings were by way of certiorari and mandamus. See also *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal* [1959] A.C. 663, 683, 684–685 (certiorari). But see the criticisms of *Davies* v. *Price* in *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147, 171, 199.

[39] See above, p. 159.

[40] Apparently from extrinsic evidence. Note that proceedings here were by way of appeal, not certiorari, so there was no problem about the admissibility of extrinsic evidence. In a certiorari case the Minister would have been unable to plead the "other facts and considerations" unless they were mentioned in the record; and the court cannot pay any attention to facts and considerations which are not placed before it (see *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.*, below, p. 161.

[41] [1947] 1 D.L.R. 501, 547. *Cf. R.* v. *Inhabitants of Bedel* (1787) 95 E.R. 245, 246.

Even when no reasons are stated, the court is not powerless to review the reasons for the decision, since it may be able to infer from the circumstances what the reasons are. Thus, in *Padfield* v. *Minister of Agriculture* it was said:

> "If all the prima facie reasons seem to point in favour of his [the Minister's] taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions." [43]

Similarly, in *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.*, a case concerning an appeal from an income tax assessment, the Privy Council said:

> "Their lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action. . . . But this does not mean that the Minister by keeping silent can defeat the taxpayer's appeal. . . . The Court is . . . always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are . . . insufficient in law to support it, the determination cannot stand. . . ." [44]

The Privy Council held that the facts shown to have been before the Minister in this case did not justify his decision. The Minister argued that justification might be found in a report to him from the local inspector of income tax, which he declined to reveal. Since he would not produce it, the Privy Council refused to assume in the Minister's favour that the report contained sufficient facts to support his determination.

Extrinsic evidence of the reasons for a decision may be hard to find, and may be unreliable. This is particularly true of authorities which consist of a number of individuals, each of whom may act for different reasons. "If a dozen persons told to consider all the circumstances of a given case, and to form their opinion thereon, were required to state what considerations they had taken into account, I do not believe that any two of them would precisely agree in their statement." [45] "There are probably few debates in which someone does not suggest as a ground for decision something that is not a proper ground; and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground, is wrong." [46]

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[42] Such an argument by the Minister would in fact have constituted an amendment to his statement of reasons; see below, pp. 162–165.

[43] [1968] A.C. 997, 1053–1054, *per* Lord Pearce. See also Lord Reid at pp. 1032–1033, Lord Hodson at p. 1049, and Lord Upjohn at pp. 1061–1062. Proceedings were by way of mandamus.

[44] [1947] A.C. 109, 123. See also *Pure Spring Co.* v. *Minister of National Revenue* [1947] 1 D.L.R. 501, 552–554; *Grimshaw* v. *Dunbar* [1953] 1 Q.B. 408; *Re Ross and Board of Commissioners of Police for Toronto* [1953] 3 D.L.R. 597.

[45] *Allcroft* v. *Lord Bishop of London* [1891] A.C. 666, 681, *per* Lord Herschell.

Moreover, in certiorari cases, extrinsic evidence of the reasons for a decision is not admissible at all, unless the reasons are so defective as to deprive the tribunal of jurisdiction,[47] or unless the reasons can be inferred from the record.[48] A case which demonstrates these difficulties is *R.* v. *Medical Appeal Tribunal, ex p. Gilmore*,[49] in which the amount of the compensation awarded for an industrial injury, when read in conjunction with a medical report referred to in the award, showed that the tribunal had failed to take a particular factor into account when assessing compensation. If the award had not referred to the medical report, the report would not have formed part of the record, and the applicant would have had no remedy. It is often difficult to tell whether documents from which the reasons for a decision can be inferred form part of the record.[50] All these problems would disappear if section 12 of the Tribunals and Inquiries Act was extended to cover all judicial and administrative decisions.[51]

E. AMENDMENT OF STATEMENT OF REASONS

To what extent can a tribunal or authority subsequently amend the statement of reasons contained in one of its previous decisions?

One point must be emphasised at the outset—there is no general rule requiring decisions to be in writing.[52] Where reasons disclosing an error of law are stated orally for a conviction but are omitted from the written register of convictions, the oral conviction may be quashed for error of law on the face of the record.[53] An oral conviction supports a plea of *autrefois acquit.*[54] Time for appealing runs from the date of the oral decision, not from the date of the written record.[55]

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[46] *R.* v. *L.C.C.* [1915] 2 K.B. 466, 490–491, *per* Pickford L.J. See also *R.* v. *Brighton Corporation, ex p. Thomas Tilling Ltd.* (1916) 85 L.J.K.B. 1552, 1556; *Arthur Yates and Party Ltd.* v. *Vegetable Seeds Committee* (1945) 72 C.L.R. 37, 82–84, *per* Dixon J.

[47] For an example of such reasons, see *R.* v. *Liverpool Justices, ex p. W.* [1959] 1 W.L.R. 149.

[48] *Inhabitants of South Cadbury* v. *Inhabitants of Braddon* (1710) 91 E.R. 515.

[49] [1957] 1 Q.B. 574.

[50] S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968), p. 417; Fitzgerald and Elliott, "Certiorari: Errors of Law on the Face of the Record," (1963–64) 4 *Melbourne University Law Review* 552, 566 *et seq.*; F. H. Newark, "On Appealing to the Lords," (1948–50) 8 *Northern Ireland Law Quarterly* 102, 111; *R.* v. *Patents Appeal Tribunal, ex p. Swift & Co. Ltd.* [1962] 1 All E.R. 610; A. S. Abel, "Materials Proper for Consideration in Certiorari to Tribunals," (1963–64) 15 *University of Toronto Law Journal* 102, 110–122.

[51] See above, p. 157.

[52] A. Rubinstein, *Jurisdiction and Illegality* (1965), pp. 190–191. *Contra*, *Stone's Justices' Manual* (97th ed., 1965), p. 300; *Jones* v. *Williams* (1877) 46 L.J.M.C. 270; *Pearson* v. *Heys* (1881) 45 J.P. 780 (but the dictum is omitted in (1881) 7 Q.B.D. 260). Requirements concerning writing can of course be imposed by statute: *Nutter* v. *Moorhouse* (1906) 68 J.P. 184.

Consequently, in the event of conflict between the original oral decision and the subsequent written record thereof, it is the oral decision which prevails.[56] That is why written convictions [57] and warrants of commitment [58] containing formal defects can be replaced by new written convictions or warrants at any time, provided that the conviction has not been quashed by certiorari [59] or a return made to a writ of habeas corpus.[60] Written orders by magistrates in civil cases may also be altered so as to conform to the original oral decision [61]; and, even if amendment does not occur, those parts of a written order which do not correspond to the oral decision may be treated as a nullity in collateral proceedings.[62]

Apart from those cases where the written record of a decision is amended so as to bring it into conformity with the original oral decision, the extent of the power of amendment is uncertain.

It is submitted that a tribunal or authority should always be able to *amplify* its original statement of reasons. If there is a duty to state reasons, the tribunal or authority can be compelled by mandamus to make a statement of reasons, or to complete an existing inadequate statement; no one objects that the statement is made or completed after the actual decision, and it has never been suggested that the case must be reconsidered *ab initio.*[63] Why should the tribunal or authority not be able to make or complete its statement of reasons after its original decision, of its own motion, without being compelled to do so by mandamus? Nor would there seem to be any objection to the same course being pursued by a tribunal or authority which is *not* under a duty to state reasons; at all events, the superior courts would not object, since the fuller the statement of reasons, the greater the possibility of judicial review.

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[53] *R.* v. *Chertsey Justices, ex p. Franks* [1961] 2 Q.B. 152.

[54] *R.* v. *Manchester Justices, ex p. Lever* [1937] 2 K.B. 96; *R.* v. *Birkenhead Justices, ex p. Fisher* [1962] 3 All E.R. 837; *R.* v. *Essex Justices, ex p. Final* [1963] 2 Q.B. 816; *R.* v. *Campbell, ex p. Hoy* [1953] 1 Q.B. 585.

[55] *Ex p. Johnson* (1863) 3 B. & S. 947.

[56] *Re Cavenett* [1926] N.Z.L.R. 755.

[57] *R.* v. *Barker* (1800) 1 East 186; *R.* v. *Allen* (1812) 15 East 333; *Chaney* v. *Payne* (1841) 1 Q.B. 712, 722–724; *R.* v. *Richards* (1844) 5 Q.B. 926; *Charter* v. *Greame* (1849) 13 Q.B. 216. The rule used to be different in civil cases: *Morse* v. *James* (1738) Willes 122, 125; *R.* v. *Cheshire Justices* (1833) 5 B. & Ad. 439; *Stone's Justices' Manual* (97th ed.), p. 300; but see below, notes 61 and 62.

[58] *R.* v. *Richards* (1844) 5 Q.B. 926; *Ex p. Cross* (1857) 26 L.J.M.C. 201; *Re Smith* (1858) 3 H. & N. 227.

[59] *Chaney* v. *Payne* (1841) 1 Q.B. 712; *R.* v. *Chaney* (1838) 6 Dowl. P.C. 281. But see *Ex p. Austin* (1880) 45 J.P. 302; *Ex p. Kenyon* (1881) 45 J.P. 303.

[60] *Charter* v. *Greame* (1849) 13 Q.B. 216, 234; *R.* v. *Catterall* (1731) Fitzg. 266. See also *R.* v. *Ipswich* (1706) 92 E.R. 313, 318 (mandamus).

[61] *R.* v. *Lanyon* (1872) 27 L.T. 355; *Cooper* v. *Cooper* [1940] P. 204.

[62] *Cooper* v. *Cooper* (*supra*); *Cohen* v. *Cohen* [1947] P. 147.

[63] In *R.* v. *Governor of Brixton Prison, ex p. Pitt-Rivers* [1942] 1 All E.R. 207 (habeas corpus—wartime detention) and *R.* v. *Home Secretary, ex p. Bressler* (1924) 88 J.P. 89, C.A. (habeas corpus—deportation) the courts allowed warrants of commitment which did not contain an adequate statement of the grounds of detention to be supplemented by affidavits. See also *Chambers' Case* (1628) Cro.Car. 133; *Anon.* (1673) 1 Mod.Rep. 103; R.S.C., Ord. 54, r 7 (2). *Cf.* the law of master and servant concerning statement of cause for dismissal (above, p. 157). *R.* v. *Thomas* (see above, p. 158, note 29) causes some difficulty, but can probably be distinguished because the applicant asked for mandamus to hear and determine in accordance with law, not for mandamus to compel the justices to state reasons.

Subtracting from the original statement of reasons, or *substituting*[64] new reasons, raises different problems, and is probably unlawful. Lord Goddard said in *R.* v. *Licensing Authority for Goods Vehicles for the Metropolitan Area, ex p. B. E. Barrett & Co. Ltd.* that, "where the language of the tribunal, in which it expressed its judgment, is clear and there is no ambiguity, it would be quite wrong for this court to entertain affidavit evidence or other matter to try to explain that the tribunal . . . meant something different from what it said."[65] Apparently, the only affidavit submitted in that case came from the tribunal itself.[66] If the tribunal is precluded from saying that it meant something different from what it said, it would seem to be precluded *a fortiori* from actually altering what it said.[67] Moreover, in so far as a duty to state reasons exists, the duty must apply to the real reasons for the decision, not other reasons which the tribunal has thought up afterwards. Finally, where the rules of natural justice apply, substitution of reasons may lead to a breach of the *audi alteram partem* principle, since the new substituted reason may relate to a matter on which the aggrieved party was not given an opportunity to state his case.

It may be that the original reasons stated are bad in law and that other reasons could have justified the decision. But in these circumstances it is best to withdraw the decision (or, if that is impossible,[68] to get it quashed or reversed) and to readjudicate *ab initio*. If the tribunal or authority simply alters the reasons stated without withdrawing the original decision, the probability is that its action will be primarily inspired by a desire to salvage as much as it can of its original decision—and, whatever the subject-matter of the case, this desire is almost certain to be regarded by the law as an illegitimate consideration, invalidating the decision.[69]

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[64] This includes the situation where the tribunal or authority, without withdrawing its original reason, adds a new alternative reason which is unrelated to the original reason.

[65] [1949] 2 K.B. 17, 22 (D.C.). *Cf.* Lord Cairns in *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872) L.R. 5 H.L. 418, 462.

[66] *Per* Humphreys J. at p. 27. Proceedings were by way of mandamus.

[67] It is well known that judges of superior courts "edit" their judgments for the law reports, but the alterations are generally very slight. Besides, apart from the scarcely relevant possibility of excess of jurisdiction, a superior court's judgments can only be challenged by appeal, and alterations in the text of the judgment in the court below do not obstruct appellate proceedings; but certiorari and the other remedies available against decisions of inferior tribunals could be obstructed if inferior tribunals were able to alter the text of their decisions at will at any time (*e.g.* errors could be removed from the face of the record). Consequently inferior tribunals would probably not be allowed to share this privilege of superior courts.

[68] See G. Ganz, "Estoppel and *Res Judicata* in Administrative Law" [1965] P.L. 237.

F. TRAVERSING THE REASONS STATED

To what extent can the party aggrieved by a judicial or administrative decision plead the falsity of the reasons stated in the decision? This problem can take several different forms.

(i) The party aggrieved may try to argue that the tribunal "meant something different from what it said." This argument is doomed to failure.[70]

(ii) He may try to argue that "the reason given for their decision on the face of the order was not the real reason which moved them." He cannot prove this by extrinsic evidence in certiorari cases,[71] unless the defect goes to jurisdiction; but in other types of proceedings he may be able to prove it,[72] if he can satisfy the very heavy onus of proof applicable to what is in effect an allegation of fraud.

(iii) He may try to argue that the reasons stated in the written version of a decision do not correspond to the reasons stated in the original oral decision. This is an argument which can always be put forward, even in certiorari cases, since the oral decision forms part of the record.[73]

(iv) He may try to argue that a fact recited in the statement of reasons is false. Generally speaking, the courts are ready to entertain such an allegation (although in certain types of proceedings, *e.g.* collateral proceedings and actions for a declaration, proof of the allegation will not invalidate the decision unless the fact goes to jurisdiction). But in habeas corpus and certiorari proceedings there are limitations on the circumstances in which such an allegation can be put forward; and these limitations call for considerable discussion.

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[69] But there are cases indicating that an *administrative* body exercising quasi-judicial functions achieves a sufficient compliance with the *audi alteram partem* rule if it suspends the execution of a decision taken without a hearing and gives the aggrieved party an opportunity to request reconsideration of the decision: *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (1890) 24 Q.B.D. 703; *Att.-Gen.* v. *Hooper* [1893] 3 Ch. 483; *de Verteuil* v. *Knaggs* [1918] A.C. 557; *Urban Housing Co. Ltd.* v. *Oxford City Council* [1940] Ch. 70; *Ridge* v. *Baldwin* [1964] A.C. 40, 79, 97–99, 119–120, 129. However, *courts* must set aside decisions taken without a hearing before reconsidering the case: *Lazard Bros* v. *Midland Bank Ltd.* [1933] A.C. 289, 307; *Re the Affairs of Hart* (1943) 169 L.T. 60; *Cameron* v. *Cole* (1944) 68 C.L.R. 571; *Ex p. Rossi* [1956] 1 Q.B. 682, 693–694.

[70] See above, p. 164.

[71] *Colam* v. *Mansfield* (1872) 26 L.T.(N.S.) 661, 663.

[72] But members of tribunals cannot be compelled to give evidence about the reasons for their decisions; see above, p. 155, note 10.

[73] *R.* v. *Chertsey Justices, ex p. Franks* (see above, p. 163, note 58). But see note 72, above.

The position in certiorari cases is relatively straightforward. It was well established that the King's Bench could only look outside the record and consider affidavits if a defect was alleged which went to jurisdiction.[74] It was equally well established that the record had to set out all the facts necessary to give the inferior tribunal jurisdiction.[75] Inevitably, therefore, affidavits produced by the applicant almost always contradicted a statement on the record; but they were nevertheless admissible.[76]

At common law the position relating to habeas corpus was much the same. Warrants of commitment issued by inferior courts had to state all the facts necessary to give the court jurisdiction.[77] But affidavits were admissible to prove defects going to jurisdiction,[78] even though this almost always meant traversing a statement in the return to the writ.[79] The difference between habeas corpus and certiorari is that habeas corpus only lies in theory for defects going to jurisdiction, and not for errors on the face of the record; but, when the decisions of inferior tribunals are tested by habeas corpus, the notion of jurisdictional facts receives a very wide interpretation,[80] although sometimes the courts will only interfere if there was *no evidence* of jurisdictional facts.[81]

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[74] *R.* v. *Nat Bell Liquors Ltd.* [1922] A.C. 128, 155–156; *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 342, 352.

[75] *Taylor* v. *Clemson* (1842) 114 E.R. 378, 401 (*per* Tindal C.J. in the Exchequer Chamber); S. A. de Smith, *Judicial Review of Administrative Action* (2nd ed., 1968), p. 95; A. Rubinstein, *Jurisdiction and Illegality* (1965), pp. 69, 170–171. See also the *Supreme Court Practice*, 1967, Vol. I, p. 253 (collateral proceedings). But the rule does not apply nowadays to statutory tribunals which are not courts of record: *R.* (*Wexford County Council*) v. *Local Government Board* [1902] 2 I.R. 349, 395; *R.* v. *Connell, ex p. Hetton Bellbird Collieries Ltd.* (1944) 69 C.L.R. 407; *cf. MacCosham Storage and Distributing Co.* (*Saskatchewan*) *Ltd.* v. *Canadian Brotherhood of Railway Employees* (1958) 14 D.L.R. 725.

[76] *R.* v. *Bolton* (1841) 1 Q.B. 66. *Cf. Thompson* v. *Ingham* (1850) 14 Q.B. 710 (prohibition).

[77] *Deybel's Case* (1821) 4 B. & Ald. 243; and see below, note 80. This rule did not apply to warrants issued by superior courts: *Brenan and Galen's Case* (1847) 10 Q.B. 492.

[78] *Re Authers* (1889) 22 Q.B.D. 345; *Re Cavenett* [1926] N.Z.L.R. 755. But affidavits were not admissible to prove that an offence was committed in a place outside the jurisdiction of the court: *Re Newton* (1855) 16 C.B. 97 (Central Criminal Court); *Re Smith* (1858) 3 H. & N. 227, 234 (magistrates' court).

[79] Consequently the eighteenth-century rule (Holdsworth, *History of English Law*, Vol. 9, p. 120) that returns to habeas corpus could not be traversed is clearly obsolete. But see above, note 78.

[80] A. Rubinstein, *Jurisdiction and Illegality* (1965), pp. 111–116. In particular, the warrant had to contain a finding of fact in respect of every element which needed to be proved in order to secure a conviction; thus, in the case of larceny, the warrant would be bad if it failed to recite that the prisoner took the goods "without the consent of the owner." Failure to comply with this rule was regarded as going to jurisdiction, and the prisoner was therefore entitled to habeas corpus and to an action for false imprisonment. See *Wickes* v. *Clutterbuck* (1825) 2 Bing. 483; *Fletcher* v. *Calthrop* (1845) 9 Jur. 205; *Ex p. Cross* (1857) 26 L.J.M.C. 201; *Re Smith* (1858) 3 H. & N. 227. This particular requirement of the common law has now been abolished by r. 77 (1) of the Magistrates' Courts Rules 1952.

[81] *Bailey's Case* (1854) 3 E. & B. 607; *Re Baker* (1857) 2 H. & N. 219.

The Habeas Corpus Act 1816 empowers the court to inquire into the truth of the fact stated in the return in all cases other than criminal cases and imprisonment for debt or by process in any civil suit.[82] However, the Act does little to alter the common law rules.[83] Halsbury [84] says that even under the Act "facts alleged on the return which were within the jurisdiction of a court cannot be challenged"; the cases which he cites are inconclusive, but in principle he must be right, since habeas corpus theoretically only lies for defects going to jurisdiction. But jurisdictional facts are interpreted just as widely under the 1816 Act as they are at common law.[85]

At common law, anyone who deliberately made a false return to a writ of habeas corpus could be sued in an action on the case,[86] and was also liable to attachment for contempt.[87] These remedies originated before it became possible to traverse returns to prerogative writs, and the reason why they are not used nowadays is probably because they are no longer necessary, now that it is possible to traverse returns. They give no added protection to the applicant; like affidavits traversing the return, they are only useful if the defect goes to jurisdiction, since the applicant will lose his action on the case through failing to prove special damage unless the falsehood relates to a matter going to jurisdiction, and the courts are not likely to punish the respondent for contempt if he has only misled them as to matters which can have no influence on the court's decision.[88] There is no way of evading the rule which limits habeas corpus to jurisdictional defects.

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[82] 56 Geo. 3, c. 100, ss. 3 and 4. The onus of proof is on the respondent: *R.* v. *Governor of Brixton Prison, ex p. Ahsan* [1969] 2 Q.B. 222, distinguishing *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284.

[83] Would the rule about onus of proof (see previous note) have been the same at common law? Would *Re Newton* and *Re Smith* (see above, p. 166, note 78) have been decided differently if they had been brought under the 1816 Act?

When the Act was passed, returns to habeas corpus could not be traversed at common law, so the Act brought about a useful reform; the Act is unnecessary now, because the common law itself changed after 1816. *Cf.* above, p. 166, notes 78 and 79.

[84] *Halsbury's Laws of England* (3rd ed.), Vol. 11, p. 46.

[85] *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria* [1931] A.C. 662. *Cf. R.* v. *Board of Control, ex p. Rutty* [1956] 2 Q.B. 109, which followed *Bailey's Case* and *Re Baker* (see above, p. 166, note 81).

The concept of a fact was given a narrow interpretation in *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284, where the respondent made a detention order which recited (following the wording of the relevant statutory instrument) that he had "reasonable cause to believe" that the appellant was "a person of hostile associations." The House of Lords held that the words "if the Secretary of State has reasonable cause to believe" meant "if he thinks he has reasonable cause to believe"; consequently, the only fact in issue was the state of the Home Secretary's mind, not the objective existence of the grounds of his belief.

[86] *R.* v. *Rogers* (1823) 3 Dow. & Ry.K.B. 607. The action did not lie if the gaoler "does not profess to make the statement as his own," *i.e.*, if he merely quoted the warrant of commitment (as he normally would, of course): *Re Clarke* (1842) 2 Q.B. 619, 635, *per* Patteson J.

[87] *Watson's Case* (1839) 9 Ad. & El. 731, 804 *et seq.* In this case the false return was not made deliberately, so the court merely ordered the return to be amended, without taking any action against the gaoler.

Apparently the same remedies existed in the case of false returns to other prerogative writs,[89] and in the case of certiorari they must have fulfilled a useful purpose, by deterring respondents from concealing or falsifying those parts of the record which revealed an intra-jurisdictional error on the face. Unfortunately, it is not easy to see how these remedies could have survived the abolition of returns to certiorari, mandamus and prohibition in 1938.[90] But it would still presumably be contempt of court to mislead the court in a certiorari case by concealing or falsifying part of the record.

G. DE LEGE FERENDA

The absence of a general duty to state reasons for decisions represents a serious gap in English law. It enables bodies exercising judicial or administrative functions to commit errors of law, and even to exceed their jurisdiction [91] or to violate the rules of natural justice,[92] with impunity. Even when reasons are stated voluntarily or can be inferred from the circumstances (and such cases are the exception rather than the rule), the individual aggrieved by the decision still finds himself at a disadvantage if he tries to challenge it.[93]

The Franks Committee noted that "almost all witnesses have advocated the giving of reasoned decisions by tribunals." The Committee considered that the giving of reasoned decisions was necessary if administrative procedure was to be fair to the citizen (who might otherwise suspect that he had been the victim of an arbitrary decision); failure to state reasons would totally frustrate such rights of appeal as might exist; and reasons were more likely to have been properly thought out if they had to be stated in writing.[94]

What is needed is an extension of section 12 of the Tribunals and Inquiries Act to cover *all* judicial and administrative decisions. Although certain exceptions might be necessary,[95] the general principle cannot be regarded as unworkable, since it is accepted to varying degrees in the administrative laws of France,[96] West Germany,[97] the United States,[98] Israel,[99] Cyprus[1] and the European Communities.[2] Arguments against the acceptance of such a principle are not very persuasive. Thus, witnesses might not relish being told by a tribunal why their evidence has not been believed, but this happens every day in ordinary courts without any serious trouble resulting. Drafting a statement of reasons might make slight inroads on a tribunal's time, and might lead to a slight increase in litigation challenging the tribunal's decisions; but these inconveniences would be more than offset by increased fairness in judicial and administrative processes, and by increased public confidence in the fairness of such processes.

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[88] But a stricter view was taken *obiter* in *Watson's Case* (see previous note).

[89] See *Comyn's Digest* V, 38–40, on mandamus.

[90] Administration of Justice (Miscellaneous Provisions) Act 1938, s. 7 (3).

[91] *Cf. R.* v. *Liverpool Justices, ex p. W.* [1959] 1 W.L.R. 149.

[92] *Cf. Re Ross and Board of Commissioners of Police for Toronto* [1953] 3 D.L.R. 597. In this case, as in *R.* v. *Liverpool Justices, ex p. W.*, the reasons were inferred from extrinsic evidence, but there must be many cases where such inferences are impossible.

[93] See above, pp. 159–161.

[94] Cmnd. 218 (1957), paras. 98 and 351. The Donoughmore Committee considered that the duty to state reasons ought to be recognised as "a third principle of natural justice" (Cmd. 4060 (1932), p. 80).

[95] In addition to the exceptions listed in s. 12 of the Tribunals and Inquiries Act (above, p. 157, note 22), it would clearly be undesirable for a warrant of arrest, for instance, to have to name the police's sources of information. It would also be unreasonable for a jury to have to give reasons for its verdict; the reasons suggested in the judge's summing up would have to serve as a substitute.

MICHAEL AKEHURST.*

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[96] M. Waline, *Droit administratif* (9th ed., 1963), pp. 478–479.

[97] B. W. Evans, "French and German Administrative Law . . . ," (1965) 14 I.C.L.Q. 1104, 1118; *Verwaltungsgerichtsordnung*, 1960, Art. 73 (3).

[98] Administrative Procedure Act 1946, s. 8.

[99] Administrative Procedure Amendment (Statement of Reasons) Act 1958, s. 2 (comment by J. Pelley-Karp in (1963) 12 *American Journal of Comparative Law* 72).

[1] Constitution, Arts. 29 (1) and 30 (2), (3). (Text in Cmnd. 1093 (1960), p. 104.)

[2] ECSC Treaty, Arts. 5 and 15; EEC Treaty, Art. 190; Euratom Treaty, Art. 162.

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IBI RENASCIT JUS COMMUNE

No reader of the *Modern Law Review* [1] can fail to have been impressed by Professor Hahlo's eloquent plea against codification of the English common law, and no reader could fail to concur in most of his principal points. His statement of the aims and achievements of past codifications is, in the main, unchallengeable. Who, as Mr. Commissioner Gower asks,[2] could deny that it is a fallacy to suppose that codification can ever bring the law within the comprehension of the " uninstructed layman "? Who could deny that codes—like any other source of law—require interpretation? Professor Hahlo himself cites Professor F. H. Lawson's apposite and accurate dictum, " The adoption of a code is not likely to do anyone any harm . . . however a code is not a panacea. One must not expect too much of it." [3] No one would quarrel with this.

Professor Hahlo's thesis, however, seems to be that a code *will* do some harm: that codification is not worth the undoubted price which has to be paid for it. For him at least, the grass is not always greener on the other side. The object of this brief comment is to attempt to answer two general questions which Professor Hahlo poses and which Professor Gower, as a Law Commissioner, concerned solely with the *rationale* of the two Law Commissions' projected Codes of Obligations, rightly did not find it necessary to deal with. These two questions are first, why codify?; and secondly, is the cost as high as Professor Hahlo would have us believe?

One preliminary point must be made: if a case is to be established for or against codification, it must be based on rational and not on emotional grounds. On reading and re-reading Professor Hahlo's paper, the present writers have felt that basic to his approach is some sort of fundamental emotional attachment to " the Common Law " itself. One is reminded of Sir Frederick Pollock's celebrated paean of praise for " our Lady the Common Law " and feels that Professor Hahlo is desperately anxious that the *virgo* remain *intacta*.

If codification is not a panacea, neither is it the sin against the Holy Ghost. Professor Hahlo concedes [4] that " there are areas of the law which, by universal consent, can be codified with advantage, and which, in the interests of the administration of justice ought to be codified," and cites as examples procedure, evidence, " certain special contracts " and " possibly " criminal law. No criterion is given by which the codifiability of an area of law can be determined. It simply seems that there is some sacred central area which Professor Hahlo wishes to remain inviolate. Metaphors are always dangerous: the common law is not a " seamless web "; codes are not necessarily *Professorenrecht* (with all the pejorative undertones of that phrase in English eyes). Systems of law, codified or uncodified, are simply devices of social regulation which, like any other social institution, must be judged by their efficiency in the context in which they operate.

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[1] (1967) 30 M.L.R. 241.

[2] *Ibid.* at p. 259.

[3] *Ibid.* at p. 252.

[4] *Ibid.* at p. 243.

Is there anything so special about the United Kingdom to make codification (a perfectly acceptable juristic device over most of the globe) unacceptable in Britain? The burden of proof in favour of change clearly rests with its proponents; but arguments whether from tradition or emotion are surely no sufficient answer from its opponents.

How, then, is the burden of proof in favour of codification to be discharged?

First, codification can be, and is, clearly intended by the Scottish and English Law Commissions to be a vehicle of law reform. No one, one takes it, would deny that the law needs to be reformed. For many years both England and Scotland have had their respective Law Reform Committees; it was precisely because of the necessarily piecemeal approach of these bodies that the present Administration felt it necessary to establish the Law Commissions.

To employ codification as a vehicle of law reform does not, however, entail an adoption of the concepts and institutions of Continental codes: it would be perfectly possible for an English codification to represent a reforming and creative restatement of indigenous institutions without importing all the juristic concepts of continental Europe which have operated in the past centuries. The Indian experience is a clear example.

Secondly, codification can be the vehicle of the unification of the laws of the United Kingdom—a sporadic aim of law reformers ever since the Union of the Crowns in 1603. Unification has certainly been one of the aims of codification in continental Europe: it was necessary in France because it was clearly undesirable to change laws as often as one changed horses; in Germany codification was the logical outcome of the unification of the German states under the dominance of Prussia.

The third point is a more complex one: simplicity. As was noted above, no one believes that the " uninstructed layman " is going to benefit directly from codification. Advocates of codification do not expect to see navvies and bus conductors with copies of the code in their hip pockets for easy reference. But a code may indirectly assist the navvy and the bus conductor by rendering simpler the task of the lawyer and therefore more efficient the service he renders his clients.

Professor Hahlo argues very forcefully that the task of the practising continental lawyer is rendered no easier by the existence of a code, and that he, too, needs a large library. Rules, he rightly stresses, have to be interpreted, and so limited is the area which any code can cover that the same amount of interpretative material will be necessary whether one practises in Bonn or Birmingham. The lawyer, says Professor Hahlo,[5] "may find the textbook statement of more use to him than a code provision, for whereas a code provision expresses in stark terms the rule, and leaves it at that, a good textbook explains the rule as well as the reasons behind it, discussing decided cases and speculating on open questions." This seems to suggest that codifiers believe that the introduction of codes would entail the disappearance of texts or at any rate diminish their utility. This is to miss the point.

Let the law of contract be taken as an example: for the most part it is not regulated by statute: its foundations are the decisions of the courts; thus what a textbook writer on contract states is not "rules" but his interpretation of judicial decisions. The only "rules" which exist in English or Scots law are statutory provisions. Section 1 of the Misrepresentation Act 1967 is a "rule," but it last year took the House of Lords to decide[6] whether the decision in *Tweddle* v. *Atkinson*[7] was, as the textbook writers alleged, a "rule." Thus a code does have the advantage of enshrining the basic principles of law in an ordered and coherent set of "rules"—which no one denies must be interpreted.

Although the example given is drawn from the law of contract, it is a solecism to suppose that contract is the one and only codifiable area. Obligations in general rather than one of the sources of obligations constitute a logical field of inquiry for the codifier. *Rylands* v. *Fletcher*[8] is just as codifiable as *Tweddle* v. *Atkinson*.

Interpretation, of course, entails an armoury of interpretative materials at the disposal of the practitioner. But in a codified system, interpretative material serves a different purpose to case law and textbooks in uncodified jurisdictions. *Doctrine* and *jurisprudence* serve as ammunition to the French lawyer. A judgment of an English court is something different: it is a "decision" which is the "authority" for a legal proposition: the "*ratio decidendi*" of the case—and no one knows how to discover the "*ratio decidendi*." It would be interesting to count the number of pages devoted by academic lawyers to the question of what "is" the *ratio decidendi* of a case—but life is short. And when it comes to the practice of the law all of us know that one of the most commonly observed patterns of judicial pronouncement is of the order that "the case of *Cox* v. *Box* did not decide proposition A., but is only 'really' authority for proposition B." Exemplification would be otiose.

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[5] *Ibid.*, at p. 247.

[6] *Beswick* v. *Beswick* [1967] 2 All E.R. 1197.

[7] (1861) 1 B. & S. 393.

[8] (1868) L.R. 3 H.L. 330.

Professor Hahlo is a brilliant advocate. As an example of the debatability and the uncertainty of codified rules, he cites Articles 1382 and 1383 of the French Civil Code, which read as follows:

> "*Art. 1382. Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*
>
> *Art. 1383. Chacun est responsable du dommage qu'il a causé non seulement par son fait, mais encore par sa négligence ou par son imprudence.*"

These two articles are, as every first-year law student knows (one hopes), the classic examples of generality in code legislation. Given the pre-industrial nature of French society in 1804, their generality is explicable and, once more, explanation would be superfluous. There is no reason, however, why delictual provisions in a code should be of *Donoghue* v. *Stevenson* [9]-like generality.[10] Again, if Professor Hahlo will open his Petit Dalloz edition of the French Civil Code at random [11] he will probably find that his eye will light on an article less general than 1382 or 1383.

It takes two to make an argument: with many of Professor Hahlo's arguments on this issue no one—certainly not the present writers—would disagree. One can only stand back and admire the brilliance with which he delivers one knock-out blow after another at the empty air in support of the incontestable and uncontested propositions that codes do not resolve all doubts, that they do not enable lawyers to produce instant justice, that [12] "it is of the nature of law that the bulk of it should be certain, but that there will always be a fuzzy zone of uncertainty around the edges."

The propositions which the present writers would wish to assert on the basis of what has been said above, and which Professor Hahlo seems, if not to deny, at least to neglect, are:

> 1. A code does provide a logically articulated skeleton for the law, granted, of course, that the skeleton will require flesh to cover it.

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[9] [1932] A.C. 562.

[10] See for example the detailed delictual provisions of the Ethiopian Civil Code (Arts. 2027–2161) and the drafter's, Professor René David's, comments thereon in 37 Tulane L.R. (1963) at p. 187, and *Dos Estudos Juridicos em Honora de Soriano Neto* (1962) vol. 1, at p. 231.

[11] While he has it to hand, he might care to look at the *Loi du 30 Ventôse an XII* which precedes the text of the Code and he will see the error of his statement on p. 254 that the *Code Civil* came into life complete and fully formed.

[12] (1967) 30 M.L.R. at p. 252.

2. The fact that a code—in this instance *like* a statute—is a material source of law. It may not give the practitioner the answer to his problem, but it will give him a juridically authoritative point of departure.

These then are the arguments for codification in the United Kingdom: it can be a vehicle for reform and rationalisation: it can serve to unify: it can assist the legal profession in its labours.

The second question now arises: there is a price to be paid; what is it, and is it worth paying? The items on Professor Hahlo's bill seem to be these:

1. Codes will have to be amended—" the codifier's ever recurring nightmare from which there is no escape." [13]
2. The fact that the work of codification " will keep the best legal brains in England and Scotland busy for the next twenty or thirty years." [14]
3. The necessity for practitioners to relearn the law.[15]
4. The creation of a lengthy period of legal uncertainty [16] while the skeleton is clothed.

The cost, Professor Hahlo thinks, is too high. Let us scrutinise the bill closely.

1. Amendment—the " ever recurring nightmare." The present writers are victims of the naive belief that all law, whether written or unwritten, codified or uncodified, is subject to change, and will, from time to time, require amendment. Law is a process, not a thing.

2. The occupation of the best legal brains of Britain " for the next twenty years." Tribonian and his colleagues managed the *Corpus Juris* in six years; Portalis and his colleagues managed the *Code Civil* in four. Mr. Justice Scarman and Lord Kilbrandon might well be forgiven for taking umbrage at the suggestion that they and their distinguished colleagues are such juristic cripples as to require four, five, six or seven times the number of years which their predecessors found necessary.

3. The necessity for practitioners to relearn the law. This point of Professor Hahlo's merits serious consideration. There are two answers to it. The first depends upon a distinction between the situation—as in the case of the French Civil Code—where what is being attempted is a creative, rationalising restatement of the former law, and the situation—as in, say, Ethiopia—where entirely new foreign concepts are being imported *en masse* and a profession has to relearn (or learn) its law *de novo*. Presumably the Scottish and English Law Commissions intend such codification as they do propose to be of the first variety: rationalising and restating. The difficulties therefore should not be excessive. Codification need not, as Professor Hahlo seems to think, be equated

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[13] *Ibid.* at p. 252.

[14] *Ibid.* at p. 253.

[15] *Ibid.* at p. 253.

[16] *Ibid.* at p. 254.

with civilisation. Once again the experience of India shows that common law codes can be effectively produced and operated by common lawyers.

As Professor Hahlo rightly stresses, the problem is one of technique rather than of substance: the techniques of statutory interpretation differ radically from those of code application. Accepting, however, the fact that codification involves a readjustment of the practitioner's technical skills, the present writers do not believe that the problems are insuperable. Certainly we know of no cases in which the result of codification has been juristic chaos, riot and bloody revolution.

The second answer to the "re-education argument" can be made briefly, and is of the same order as that given to the "twenty years" argument. Professor Hahlo seems to believe that Sir Leslie Scarman and Lord Kilbrandon are neither Tribonian nor Portalis. Equally, he would appear to believe that the average British legal practitioner is stupid, lazy, or both. He may be right, but we decline to accept this view of the legal professions of England and Scotland. Any lawyer who is worth his salt relearns his law daily.

4. The "prolonged period of legal uncertainty" is Professor Hahlo's most cogent point. It would be dishonest to deny that the immediate effect of codification would be to create uncertainty; it would be equally dishonest to deny that that uncertainty would persist until such time as the skeleton of the code had been covered with the flesh of experience. We all know that the immediate result of the Napoleonic codification in France was the *école de l'exégèse* interpreting the code as a series of logical propositions which had to be explored without reference to the social context within which they operated. Not until sufficient experience in the application of the codes has been gained could a François Gény and the *école de la libre recherche scientifique* appear. The French experience may help to shorten the inevitable exegetic period in Britain; as Professor Hahlo says, a period of uncertainty, an exegetic period, there will be. This is not particularly alarming. Statutes as well as codes pose problems of interpretation; the only distinction between the statute and the code is the extent of the area of uncertainty involved.

What then does the price of codification amount to? A few currently incompetent practitioners will probably become even more incompetent; the competent majority may have to work harder and think more constructively. The choice is between initial confusion and future certainty. The price, it is submitted, is not too high a one to pay for reform and rationalisation. That is where we differ from Professor Hahlo.

If ever an article in a scholarly journal had an emotive title it was Professor Hahlo's: "Here lies the Common Law: rest in peace."—*Hic jacet—requiescat in pace.* The present writers do not think so ill of the common law of England as to think that it is dead and buried. There is no need to call in the undertaker (or rather the embalmer) until the doctors have done their best.

When the *hic jacet*—or rather the *ci-gît*—has been inscribed over the policies of General de Gaulle, and Britain had joined the European Communities, the laws of an enlarged community will inevitably converge; the codification of English law will be a birth rather than a death: the birth (the rebirth, a Scots lawyer would wish to say) of a common law of Europe.

Ibi renascit jus commune.

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ARTICLE 80 OF TABLE A OF THE COMPANIES ACT 1948

In the second edition of his book on *The Principles of Modern Company Law* [1] Professor Gower says:

> " the modern rule therefore is that under an article in the terms [of Article 80] of Table A the members in general meeting cannot give directions on how the company's affairs are to be managed, nor can they overrule any decision come to by the directors in the conduct of its business. And this applies even as regards matters not specifically delegated to the directors provided they are not expressly reserved to a general meeting by the Act or the articles ";

and later he adds,[2]

> " Moreover, although the general meeting cannot restrain the directors from conducting actions in the name of the company, it still seems to be the law (as laid down in *Marshall's Valve Gear Co. Ltd.* v. *Manning Wardle & Co. Ltd.*[3]) that the general meeting can commence proceedings on behalf of the company if the directors fail to do so. These exceptions are convenient but difficult to reconcile in principle with the strict theory of a division of powers."

It is the thesis of this note that this interpretation of Article 80 [4] is wrong and that *Marshall's* case, far from being anomalous, in fact correctly states the general rule.

Having regard to the common practice of the profession and the unadvised public to adopt Table A with but minor modification for the great majority of companies (especially those which are small and private) it would as a matter of principle be unfortunate if Article 80 in truth involved a general abdication on the part of the shareholders. In the case of the village grocer (beloved of Professor Gower) who incorporates his business and at the same time brings in capital additional to his own, it is probable that the shareholders will appoint the promoter with one or two others as directors. The shareholders will intend that " the business of the company shall be managed by the directors " [5] but they would be very surprised to learn that a majority of votes could not overrule the board; otherwise they could with almost the same result have made a simple loan to the business instead of taking shares in it. As Cotton L.J. said in *Isle of Wight Railway Co.* v. *Tahourdin* [6]:

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[1] London 1957, p. 128. In the 3rd edition (London, 1969) the discussion of Article 80 appears at pages 130–133. The learned author's views have not changed, but are more briefly expressed.

[2] *Ibid.* at p. 127.

[3] [1909] 1 Ch. 267.

[4] An interpretation which is seen also in *Buckley on the Companies Act* (13th ed., London 1957) at p. 860.

[5] Companies Act 1948, Table A, Art. 80.

> " It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter *intra vires* of the directors, is not for the benefit of the company."

But that Article 80 leaves the directors under the general control of the shareholders in general meeting would seem to be apparent from its words:

> " 80. The business of the company shall be managed by the directors, who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made."

" Manage " is defined by the *Oxford English Dictionary* as " conduct the working of; have effective control of." This " conduct " or " control " is not absolute but " subject nevertheless to these regulations " (*i.e.* the articles of association—see the definition provisions of Table A) and " to the provisions of the Act." So far this is merely a reflection of section 20 of the Act and of the doctrine of " *ultra vires*." But the conduct and control are subject also to " such regulations . . . as may be prescribed by the company in general meeting." " Such regulations " is used in obvious distinction from " aforesaid regulations and provisions." The only " regulations and provisions " which are " aforesaid " are " these regulations " (*i.e.* the articles) and " the provisions of the Act." Therefore " such regulations " cannot mean the articles already in existence; nor can " such regulations " mean amendments to the articles, because " such regulations " are to be " not inconsistent with the aforesaid regulations "; and a company cannot contract out of the right to amend its articles.[7] Therefore " such regulations as may be prescribed " must be some other form of the expression of the will of the meeting and, since this form is not specially defined, it can be only a resolution passed by a simple majority of the general meeting, in which lies the residuary power of the company.[8] This construction is supported by earlier versions of the article [9] and has judicial approval.

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[6] (1883) 25 Ch.D. 320, 329.

[7] Companies Act 1948, s. 10; *Malleson* v. *National Insurance and Guarantee Corporation* [1894] 1 Ch. 200.

[8] *Grant* v. *U.K. Switchback Railways* (1888) 40 Ch.D. 135.

[9] *e.g.*, Joint Stock Companies Act 1856, Table B, reg. 46.

In *Marshall's Valve Gear Co. Ltd.* v. *Manning Wardle & Co. Ltd.*[10] the plaintiff company's articles included what is now Article 80 of Table A. Its four directors decided by a majority of three (who were all acting bona fide) to one that they would not sue the defendant company for an alleged infringement of the plaintiff's patent. The dissident director who was also the majority shareholder therefore himself brought the proceedings in the company's name. The others then moved the court to strike out the company as plaintiff and to dismiss the action on the ground that its name had been used without authority. Neville J. held that on the proper construction of the article the majority of shareholders had the right to control the action of the directors in this matter and that the motion must be dismissed. His lordship said,[11]

> " . . . the powers of the directors are regulated by [the article] . . . and under [the article] . . . the majority of the shareholders in the company at a general meeting have a right to control the action of the directors so long as they do not affect to control it in a direction contrary to any of the provisions of the articles which bind the company." [12]

In turning now to the cases on which Professor Gower relies, the writer's position is that (with the exception of *Scott* v. *Scott* [13]) they were decided on the construction of articles other than Article 80—articles which placed the matters in issue specially under the control of the directors—and that the only relevant rule which these cases establish is that the shareholders cannot (in the words of Neville J.) " affect to control the action of the directors in a direction contrary to any of the provisions of the articles which bind the company." The first of these cases is *Automatic Self-Cleaning Filter Syndicate Co. Ltd.* v. *Cuninghame* [14] where the plaintiff company's articles included not only Article 80 (there numbered 96) but also an article by which the directors were specifically empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. It is therefore quite consistent with *Marshall's* case [15] that the directors were upheld by the Court of Appeal in their refusal to carry out a sale agreement resolved upon in general meeting by a simple majority. Indeed in *Marshall's* case [16] Neville J. expressly distinguished the earlier case on the ground that it depended on the terms of a special contract in the articles; and with all due respect to Professor Gower his claim at page 121 of his book that " the relevant article was the same in both cases " is clearly unjustified.

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[10] [1909] 1 Ch. 267.

[11] *Ibid.* at p. 274.

[12] The same judicial approach will be found in *Dowse* v. *Marks* (1913) 13 S.R. (N.S.W.) 332 and in *Thomas Logan Ltd.* v. *Davis* (1911) 104 L.T. 914.

[13] [1943] 1 All E.R. 582.

[14] [1906] 2 Ch. 34.

[15] [1909] 1 Ch. 267.

[16] *Ibid.* at p. 273.

The second case is *Quin and Axtens Ltd.* v. *Salmon*[17] where the House of Lords was concerned with a company whose articles besides Article 80 (there numbered 75) included one which provided that no resolution of a meeting of directors having for its object the acquisition or letting of premises should be valid unless notice should have been given to each of the managing directors and neither of them had dissented therefrom. The directors passed resolutions with the object of acquiring and letting premises from which one of the managing directors, the plaintiff, duly dissented; but resolutions to the same effect were passed by an extraordinary general meeting of the company by a simple majority of the shareholders. It is not surprising that, at the suit of the plaintiff who brought a representative action, their lordships unanimously held that the resolutions of the company were inconsistent with the provisions of the articles and that the company must be restrained from acting on them.

The third case is *Shaw & Sons (Salford) Ltd.* v. *Shaw*,[18] a case which in so far as it is relevant to this note resembles *Marshall's* case[19] in that the question again was whether or not proceedings brought in the name of the company were authorised. This time, however, certain of the directors (in the articles called "the permanent directors") were the instituting force, the judges were concerned with an article other than Article 80 (which was also included in the regulations) and the answers given to the question were mixed. The permanent directors having brought the action in the name of the company without the approval of the ordinary directors and having persisted in it despite a resolution by the shareholders at an extraordinary general meeting that the proceedings be discontinued, Greer L.J. held that the proceedings were authorised, Slesser L.J. that they were not and Roche L.J. "by a different road reach[ed] the same result as Greer L.J."[20] It is thus difficult to extract a ratio from the decision but for the purpose of this note it is not important to do so, because Article 80 was not prominent in the reasoning of any of their lordships. Greer L.J. stated,[21]

> "the effect of [certain articles other than Article 80] is that the power of control over the financial affairs of the company and all powers of management of the affairs of the company except such as might from time to time be conferred upon the ordinary directors by the permanent directors should be vested in the three permanent directors alone."

It has been suggested to the writer that it is possible to deduce from his lordship's words that these articles entrusted to the permanent directors the same powers as would otherwise have been entrusted to the ordinary directors by Article 80. But even should this be so it does not alter the fact that these articles did not contain the clause of Article 80 which begins "subject nevertheless"; so that any observations on the powers of the shareholders, as distinct from the directors, under these articles can have no relevance to the powers of the shareholders under Article 80. Slesser L.J. argued that on the true construction of the special articles the proceedings could not be authorised at a meeting to which the ordinary directors were not summoned, while Roche L.J. rested on the technical ground that, since on the evidence the lack of authority did not plainly appear, the objection should not have been taken at the trial but in interlocutory proceedings.

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[17] [1909] A.C. 442.

[18] [1935] 2 K.B. 113.

[19] [1909] 1 Ch. 267.

[20] [1935] 2 K.B. at p. 148.

[21] *Ibid.* at p. 132.

The fourth case is *Scott* v. *Scott*,[22] a decision of Lord Clauson sitting as a judge of the Chancery Division, in which his lordship undoubtedly founded himself on Article 80, in which the directors were upheld against resolutions passed at a general meeting of the shareholders, but which nonetheless in the writer's submission neither spoils his theme nor aids that of Professor Gower. But lest it be said that the following explanation of the case is strained, there are two grounds on which its weight as an authority is challenged, *videlicet*, the learned judge avowedly did not refer to the authorities[23] and his judgment had bases as well beyond as within Article 80. The plaintiffs were two and the defendants the remaining members of a private company whose articles of association incorporated Table A. The plaintiffs successfully maintained that resolutions to the effect: (i) that weekly sums calculated on the paid-up capital in preference shares be paid to each preference shareholder as interest-free advances until the payment of the dividend for the current year, that such sums be deducted from the dividend when declared, and that if the dividend was insufficient, the deficiency be repaid to the company; and (ii) that a firm of accountants be appointed to investigate the financial affairs of the company for the previous two financial years; were invalid. As his lordship acknowledged[24] the first resolution was an attempt by the shareholders to declare an interim dividend, a power specially placed under the control of the directors by Article 115 of Table A; and the second an attempt to achieve by an ordinary resolution what under section 137 of the Act[25] then current could be done only by a special resolution. Yet the judge sought comfort also in Article 80 and it is necessary to quote him at length in this connection. On the first resolution he said,[26]

> "... [the] thing which is to be managed by the directors and with which the company may interfere only by removing the directors or by having an investigation under the statutory

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[22] [1943] 1 All E.R. 582.
[23] *Ibid.* at p. 585.
[24] *Ibid.* at pp. 584 and 585.
[25] The Companies Act 1929.
[26] [1943] 1 All E.R. at p 584.

> provisions is the management of the business of the company. . . . How can you manage a business without managing its finance, how can things be carried out if at any moment the company can interfere and say to the directors, 'You must not keep a balance at the bank although you have demands coming forward in a week or two; you must let out that money on loan because that will bring in more interest.' . . . How the directors can manage the business if they are to be interfered with in such an ordinary financial matter as to how to deal temporarily with balances which are *for the moment* [27] not required for the purpose of the business I confess I cannot conceive. It seems to me quite clear that this resolution if it is not aimed at declaring an interim dividend is aimed at interfering with the management of the business by the directors and, as such, it is wholly inoperative and the general meeting had no power to pass it."

Surely all that this means is that the day-to-day control of the business is in the hands of the directors, that this cannot be taken away nor interfered with by the shareholders without a change in the articles, and that it is essential, if such day-to-day control is to be effective, for the directors to know at any moment what moneys they have at their disposal. To have it otherwise would be not to manage the business subject to regulation by the general meeting, but to manage it not at all; and indeed his lordship said,[28]

> "I do not take the view that those limiting words 'subject nevertheless' and so forth, have anything to do with the duty cast upon the directors in the first two lines of the article to manage the business of the company.[29] However that may be and if I am wrong in that and if I ought to treat the duty cast upon them to manage the business as being 'subject to any regulation of these articles'—which of course it must necessarily be—'to the provisions of the said Act'—which it must necessarily be—'and to such regulations being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting' the question is whether the company by prescribing this . . . regulation if it be a regulation are prescribing something which is inconsistent with the aforesaid regulations or provisions. One of the aforesaid regulations or provisions is this provision about the business of the company being managed by the directors and I find the greatest difficulty in seeing how any resolution of the company in general meeting, controlling the directors in the management of the business, can possibly be justified under the terms of this article."

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[27] The writer's emphasis.

[28] [1943] 1 All E.R. at p. 585.

[29] It is respectfully submitted that his lordship's view is not justified by the syntax. If the draftsman had intended that the "subject nevertheless" clause should govern only "may exercise" it should have been inserted immediately before or immediately after those words. Furthermore his lordship's view would make necessary the difficult task of determining which powers of the company might be exercised without trespassing on the management of the business and which not.

His lordship's use of the word "management" in this passage must, in the light of his earlier words quoted above, be in the sense of day-to-day control. If so, he does not lay down that the shareholders cannot give directions on how the company's affairs are to be managed nor that they cannot overrule any decision come to by the directors in the conduct of the business. Thus if a company has funds which have been taken out of the current account of its business, there is nothing in this case to say that the shareholders in general meeting cannot by ordinary resolution order the directors to invest them in one manner rather than another. Of the second resolution his lordship said,[30] "How you can investigate the financial affairs of the company without interfering with the management of the company's financial affairs by the directors in the course of managing the business I myself am quite unable to see." The writer confesses that he is, in contrast to the judge, unable to see why investigation into the past should be an interference with the present; but submits that the point affects neither his argument nor that of Professor Gower.

One concludes that the old faith is still the true faith, that the residuary powers of the company do reside in the general meeting of shareholders acting by ordinary resolution; and that it is not true that the shareholders are powerless to act save by special resolution "even as regards matters not specifically delegated to the directors." Put positively this means that under Table A the shareholders in general meeting are able by ordinary resolution to exercise all the powers of the company which are not either specially delegated to the directors (which category includes the day-to-day control of the business) or required by the Act or the articles to be done by some special procedure; provided always that such exercise does not constitute a fraud on the minority.

G. D. GOLDBERG.*

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[30] [1943] 1 All E.R. at p. 585.

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REPORTS OF COMMITTEES

THE REPORT OF THE ROYAL COMMISSION ON ASSIZES AND QUARTER SESSIONS [1]

CRITICS and would-be reformers of British institutions often describe them as "medieval." The adjective normally equals "very old," or perhaps just "old," but it contains the perjorative element which critics require to use before unmasking their batteries—it is the "weasel" word beloved of Jerome Frank. Used as a description of the English court system the word "medieval" is, however, almost completely accurate, for apart from the county courts, the most valuable utilitarian legacy of Jeremy Bentham to our legal administrative set-up, that system follows substantially the pattern laid down in the middle ages. Such changes as have been made have been applied almost entirely in London; thus accentuating the dominant position of the capital city, itself already established in the middle ages and becoming unfortunately a more and more pronounced factor of unbalance during the succeeding centuries.

Apart from the county courts justice in the provinces has in its middle and higher reaches always been administered in courts of assize and quarter sessions which are based on a system of shires and counties going back beyond the middle ages themselves. Ever since modern industrial England came into existence the cramping effects of this system have been more and more felt. This has resulted in the setting up of commissions and committees charged with the task of working out a system which would meet the needs of modern England. Almost the first thing I can remember after my call to the Bar in 1920 was the setting up of such a committee of which an acquaintance on the Northern Circuit was made secretary and which produced some useful palliative proposals. On some occasions pretty radical schemes were put forward, but these always foundered on the twin rocks of local patriotism and the Englishman's delight in having things recognisably the same as they always have been. To get anything accepted it had to be in the shape of a patch which would not show up too vividly upon the homespun of the existing administrative coat, and quite a bit of patching of this kind has been done during the past century.

Committees with judges as chairmen are adept at this kind of thing, and in this way, somehow, the wheels of the administration of justice have been kept revolving. By the 1960s, however, the economy had heated up to the point where the business arising in all the industrial areas was becoming more than the courts could manage, and the ever-increasing wave of crime was calling for the deployment of a judicial manpower which if it existed at all could not find the courts within which to operate.

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[1] Cmnd. 4153.

The Lord Chancellor evidently felt that a commission of the normal type could not satisfy the current requirements, and recognising that the problem is essentially one of administration rather than of law determined to call upon for chairman one who had become the best known administrator in the country when as I.C.I.'s Dr. Beeching he was borrowed to devise a plan to put the tottering railway system on its feet once more. As Lord Beeching he has headed and clearly influenced this Commission. Its Report is already known by the name of its chairman, and it is my task in the following pages to set out, and discuss its principal recommendations.

Before turning to the details of these I will, however, make some observations of a general character.

First of all a cursory perusal of the summary of recommendations (p. 189) shows that this Report falls into what might be termed the radical class. It will offend many local patriots, and, if put into effect, substantially alter the pattern of administering justice which has prevailed in provincial England since the middle ages. According to the historical precedents which I have mentioned it should not therefore be viable. There are, however, several cogent reasons why it has a fair chance of becoming operative. In the first place the local authorities who are much the best armed of the defenders of the status quo are reeling under the blows aimed at them by the Redcliffe-Maud Commission, to the extent that they will not be able to provide the mass of manoeuvre required for the defence of their courts of assize and quarter sessions. In the second place the existing system is so near breaking point, as appears time after time from this Report, that all those in responsible administrative positions in the legal profession, whether judges or lawyers, are more concerned than ever before that something drastic should be done and be done quickly, as indeed are many of their most influential customers both actual and potential: this appears from the imposing list of organisations and persons who gave evidence to the Commission as set out in Appendix I. The Report is certainly radical rather than revolutionary. Thus the proposals which have been put forward from time to time for provincial courts with full jurisdiction hardly receive attention. The Commission are satisfied as to the great value of the system of itinerant judges, by means of which uniformity can be attained in sentencing, administration and other matters. London retains, therefore, its dominance, and this will no doubt help the Report's chances of implementation.

From the point of view of presentation the Beeching Report is a model. It is so clearly written as to be intelligible to any sensible layman, indeed I have heard it commended in glowing terms by a number of political colleagues. Although, as would indeed be guaranteed by the presence of a number of eminent lawyers on the Commission, the essential legal background is firmly and accurately etched in, the Report is pretty well free of technicalities, and the problems of legal administration are approached in a thoroughly common-sense manner. It was a wise decision on the part of the Lord Chancellor to look outside the legal profession for his chairman and in the event it can be seen that he could hardly have done better than select Lord Beeching though the choice was a good deal criticised at the time.

The Commission's proposals are all within the realm of practical possibility, whether we regard them as acceptable or not. They have approached their problem with an eye on the difficult financial position of the country, and yet always with the principle in mind that " a good court system should make justice of a high quality conveniently available at low cost ": " it is obvious that striving for an ideal must be tempered by economic considerations."

As one would expect with a scientist like Lord Beeching in the chair there is a welcome use of statistical material, though one could sometimes wish that this had been pushed further. The scope of this is indicated in Appendix 2, and it is certainly " likely to be of interest to others ": indeed it will be much used by researchers during the coming years. Also there is an unusual readiness to look at experience in the Dominions, the U.S.A., and even occasionally in non-common law jurisdictions, though this is not carried out consistently.

Finally I would emphasise that the Beeching Report is written within a most reasonable compass. Its 188 pages encourage me to hope that the readers of this note may decide to read it through themselves: they will find it very clear, very readable, and very much to the point.

The Report opens with a short but pregnant Foreword in which the Commission outline their method of approaching their problems and to which all later Commissions might be recommended to give attention.

The Commission obviously had first of all to describe the existing court system. This they do in masterly fashion in the compass of a short first chapter of some fourteen pages which could hardly be faulted [3] and is likely to be used by writers on the English legal system until, as one may hope will be the result of the Beeching Report itself, that system has been radically recast. There are, however, at least two points which may be usefully made here.

In discussing the Crown Courts at Liverpool and Manchester set up in 1956 on the initiative of Lord Chancellor Kilmuir the Commission refer to the strictures of the Streatfeild Committee on the dangers of concentration by judges on criminal work. This point crops up more than once in the Report, but it is never really passed upon. This matter is obviously of considerable importance in the reorganisation of the criminal work of the assize courts, and since in many parts of the world, and certainly within some common law areas such specialisation is met with, it should not have been difficult to find experience highly relevant to a discussion of its merits and demerits. In the end one is left with the feeling that the Commission were of two minds on the matter. As after concluding that the Crown Courts at Liverpool and Manchester have worked very well and referring to some other areas of our criminal law where such specialisation is found the Commission propose to leave the higher reaches of the criminal law within the jurisdiction of itinerant High Court judges at courts of assize. On the other hand at lower levels their proposals, if implemented, will lead to a much higher degree of specialisation than at present exists.

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[3] The jurisdiction of quarter sessions is not completely described, e.g. in respect of rights of way.

The other point is the section on county courts. There is no word about these in the Commission's terms of reference, and there can be little doubt that some commissions would have accordingly fought shy of bringing these courts into the picture. But having surveyed the position the Beeching Commission evidently came to the clear conclusion that to continue the watertight barriers between civil and criminal jurisdictions at intermediate levels while continuing the present fluidity at higher levels does not make sense. They propose therefore, as we shall see, to make use of the county court bench for the manning of their proposed new intermediate criminal courts. That they should have taken a common sense as opposed to a legalistic view of their terms of reference seems to me to be highly to their credit.

The deficiencies of the present system emerge fairly clearly from the descriptive chapter: in Chapter II they are set out and analysed in detail. But the existing pattern has of course many merits: otherwise it could not have stood up for so long, or have continued in operation however imperfectly at the present time.

These defects stem almost entirely from the fact that the set-up is still essentially medieval, which brings me back to my first reflection. They are of course known to all practising lawyers—more or less—though few of us sit back and think them out in detail. The factors which have brought the machinery almost to a standstill, especially in the provinces, are the terrible increase in crime combined with the generous post-war arrangements for legal aid under which pretty well every defendant charged on indictment can obtain legal assistance. The result, to take one example from the busy but reasonably well-staffed Central Criminal Court in London, is that 70 per cent. of prisoners have to wait more than two months for their trials. On the civil side too, for reasons which need not be gone into, there has been a substantial increase in the lists at the assize courts.

It is on the assize courts that the dead hand of the middle ages weighs most heavily. There are seventy assize towns to be visited by the judges. At these the amount of work varies from nil or perhaps a day or two to several weeks and of course prognostication is notoriously difficult. And it is not only the judges' time which is wasted—up to 25 per cent. we are told—or inefficiently used, but that of numerous other people. Indeed the Report points out that in understandable efforts to save the time of judges serious additional waste and inconvenience is caused to many others. Each county is an administrative unit: the records and all the paraphernalia have to be brought to the assize town which is sometimes hardly more than a large village, the court has to be set up, and then, possibly after a few hours, dismantled; the officials moving on to a similar experience in the next assize town. In the heavy centres of population two or even more judges may stay for weeks but the criminal work which is naturally given precedence may take so long that the civil calendar is never reached, or only nibbled at.

"Inflexibility" is the word repeatedly used in the Report, and how extreme it is would hardly be believed without the almost graphic description to which we are treated. When we read that the situation is "verging on the intolerable" we almost feel it to be an understatement. In addition to which financial waste, which the county can ill afford, is both heavy and obvious.

The quarter sessions system which deals with crime of intermediate gravity does not suffer from the same degree of inflexibility, and is perhaps less open to objection. Indeed the Commission pay a tribute to the high quality of the work done by the part-time Chairmen and Recorders who man these courts. But the various courts are badly co-ordinated with each other as well as with the assize system with which there is a good deal of overlapping jurisdiction. And the staffing of these courts part-time by practising barristers gives rise to many disadvantages, particularly in the borough courts where magistrates do not sit with the Recorder—inconsistency in sentencing being particularly underlined. Again the efforts of the part-time Chairmen and Recorders to hold their courts at times when there will be no interference with their practices may lead to as many as a dozen neighbouring courts all being held at the same time—one noteworthy repercussion of this is that on the prison authorities who have to provide escorts for the prisoners who are on trial at all these different courts. Clearly on the quarter sessions side of the pattern the inflexibility of the assize court system is paralleled by an almost equally intolerable complexity and lack of co-ordination.

This diagnosis, which naturally takes up a large fraction of the whole Report, is so devastating that a radical treatment is obviously called for, and the Commission's proposals for this are set out in the second half of their Report. Their plan aims at simplification primarily; at a really drastic realignment both of the courts, which will in effect ignore historical boundaries and establish competently manned courts at the points where they will be most effective to meet the requirements of the modern community, and at their administration by modern methods. For an efficiently administered system of justice should operate to remove the " inflexibility " complained of. The basic postulate on which such a system should depend is that the uneasy partnership between the central and local government institutions should come to an end and the State should accept the whole responsibility for the administration of justice at all levels above the magistracy. Moreover a system under which, however properly, the civil disputes of citizens have all the time to be postponed to the rights of accused persons to speedy trial is intolerable. The only effective solution appears to be the separation of criminal and civil business in separate and independently manned courts. All the higher criminal courts will therefore be amalgamated into a Crown Court which will work in effect in two tiers; an assize court tier and a circuit court tier.

The above are the main lines on which the Beeching Commission would restructure the courts of assize and quarter sessions. They involve the taking over by the State of the courts administering serious and intermediate crime and their unification by merger. The administrative organisation would be carried on by a system of six provincial circuits, based on Leeds, Manchester, Birmingham, Cardiff, Bristol and London. All this unification and more centralised administration will clearly throw an additional burden on the Lord Chancellor's Office, and this aspect of the reorganisation receives surprisingly little attention: though the Commission are satisfied that he should be left in charge. To me it seems that the proposals underline the importance of creating a Ministry of Justice as one of the great departments of State: an old suggestion to which the Chairman of the Law Commission has recently become an adherent.

Within each of the proposed circuits there would be a small number of primary assize towns at which there would be both criminal and civil courts, manned by visiting High Court judges but operating independently, and by circuit judges for the criminal work only. In each circuit there would be a further number of assize courts with criminal jurisdictions only, and again manned by High Court judges, supported by circuit judges. These Crown Court assizes would have full jurisdiction, but there would be a demarcation by Rules of Court between the High Court judges and the circuit judges following very much that at present existing between assizes and quarter sessions: though a division of crimes into three instead of the existing two " bands " is proposed. But the basic need for flexibility makes it important to avoid rigidity in applying this policy. The Commission propose further that the whole-time circuit judges should be assisted by a substantial number of part-time judges to be called " Recorders " who will, however, differ from the present Chairmen and Recorders of quarter sessions in that they will be expected to make themselves available for a number of neighbouring circuit courts and will have to undertake to serve for limited periods of time.

The circuit personnel is to be built up substantially from the County Court Bench, the judges of which will no longer be confined to civil litigation. It is expected that a number of additional full-time appointments will be made and that the number of part-time Recorders will be about one-third of the present personnel. A majority of the Commission favour the eligibility of solicitors for Recorderships, a proposal which is certain to give rise to controversy.

On the material logistic side an equally radical and even more expensive reorganisation is called for. If more judges are to sit in the large cities there will have to be more courts, more registries and all the other necessary paraphernalia. As one would expect with an administrator of Lord Beeching's calibre, all these matters are looked after, and an ingenious timetable of new building and rebuilding is planned which should reduce the teething troubles to a minimum, though it would be idle to pretend that this will not be a large financial mouthful for the country to swallow.

The detailed proposals made in the later chapters, some, indeed, most, of which are not new, will repay careful study on the part of all those interested or concerned: there is not space for further elaboration here. It must suffice to state that tailored to this new and up-to-date garment they acquire an added attractiveness.

CHORLEY.

THE REPORT OF THE HOUSE OF COMMONS SELECT COMMITTEE ON PROCEDURE:

SCRUTINY OF PUBLIC EXPENDITURE AND ADMINISTRATION [1]

THE control of public expenditure by the House of Commons is now largely reduced to the work of the Estimates and Public Accounts Committees in trying to ensure that government departments obtain value for money. Attempts at more general control are sporadic and usually futile.[2] In recent years, particularly since the Plowden Report of 1961,[3] changes in government procedure have removed most of the meaning from the, in any case largely formal, grant of supply.

The Report reviews these developments and proposes a three-fold role for the House of Commons.[4]

The first task of the House would be the "... discussion of the Government's expenditure strategy and policies, as set out in projections of public expenditure several years ahead." [5] The Committee welcomed the Government's promise [6] to publish an annual White Paper based on its public expenditure surveys. The first of these has now appeared [7] and consists of an analysis of proposed public expenditure over the next five years, the figures for the first three of these indicating a fairly firm commitment. The analysis is made in terms of a number of criteria, most importantly that of objectives, *e.g.*, defence and external relations, commerce and industry, each sub-divided into a number of programmes, *e.g.*, in the case of "social services": education, health and welfare, and social security. Likewise "education" is broken down into a number of categories, *e.g.*, further education, teacher training, universities, etc. Some explanation is provided as to the reasons for the variations in expenditure, *e.g.*, the proportion of increased expenditure absorbed by increases in the numbers of students, but it would not in itself appear to meet the Committee's recommendation that "explanations should be given of differences in the major figures of expenditure . . . between one year and the next within a phased programme," [8] nor is any information given on the effects of public expenditure on the balance of payments,[9] despite the hopes expressed in the Report.[10]

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[1] H.C. 410, 1968–69. References are to paragraphs of the Report and to pages of the Evidence.

[2] p. 299.

[3] Control of Public Expenditure, Cmnd. 1432.

[4] para. 12.

Some of the recommendations of the Committee for the White Paper show signs of its multiple authorship, and perhaps this is why information is requested for publication in the expenditure White Paper which would more logically be included in the annual forecast of the country's economy over the next three to five years made in what is known as the "Medium Term Assessment," in any case it was to this that the Committee next turned its attention.

In February 1969 the Government published material from the Assessment as a Green Paper,[11] and the Committee asked that in future it should contain more information, particularly on the questions of prices and earnings, but the Government has refused to commit itself to publishing such documents annually.

The second task which the Committee suggested for the House was the ". . . examination of the means . . . being adopted to implement strategy and to execute policies, as reflected in the annual estimates of expenditure." [12] The present form of the Estimates was criticised on the ground that it classifies by input (staff salaries, purchase of goods, etc.) whereas efficiency is best measured by functional budgeting, *i.e.*, bringing together all the expenditures incurred in achieving a particular purpose or objective. The other main management technique advocated by the Report is that ". . . based on the principles of defining responsibility for stated areas of work and setting objectives where responsibility could not be so defined; it has been described as 'management by objectives' or 'accountable management'." [13] The Committee hoped that, given adequate information, these techniques would enable the House to play an active role in comparing alternative ways of reaching policy objectives and in measuring efficiency.

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[5] para. 12.

[6] Public Expenditure: A New Presentation, Cmnd. 4017.

[7] Public Expenditure 1968–69 to 1973–74, Cmnd. 4234.

[8] para. 15 (a).

[9] See *e.g.* Cmnd. 4234, p. 80.

[10] para. 15 (b).

[11] The Task Ahead: Economic Assessment to 1972.

[12] para. 12.

The same techniques would, it was felt, make it easier for the House to fulfil its third task, that of ". . . retrospective scrutiny of the results achieved and the value for money obtained on the basis of annual accounts and related information from departments on the progress of their activities." [14]

The final part of the Report proposes changes in parliamentary procedure designed to enable the House to fulfil each of the three tasks. First, regarding the consideration of expenditure projections the Committee suggests an annual two-day debate on the White Paper in the light of the economic assessment.[15] The Leader of the House has accepted this recommendation on behalf of the Government in a recent Commons debate on procedure.[16] Secondly, ". . . select committees on expenditure should conduct enquiries and publish reports in time to allow their consideration by the Government and by the House before the next expenditure debate in the autumn." [17] The "Expenditure Committee" would replace the Estimates Committee and would be empowered "To consider public expenditure, and to examine the form of the papers relating to public expenditure presented to the House." [18] The bulk of this work would be done by a number of sub-committees, eight were suggested, each considering particular (functional) fields of administration such as "Trade and Agriculture," and "Defence." [19] The Reports of the Expenditure Committee would provide assistance to the House in considering expenditure predictions by pinpointing changes of policy and encouraging departments to clarify their objectives.[20] But the main function of the sub-committees would be to exercise the second task assigned to the House—that of supervising the execution of policy—by examining the ways in which departments set about reaching their objectives and their efficiency in carrying them out.

The Report goes into some detail [21] on the size and organisation of the proposed committees, and stresses the importance of equipping them with adequate staff, perhaps borrowed from the Exchequer and Audit Department. The task of retrospective scrutiny is not assigned to any specific body by the Report and so one presumes it would remain primarily the responsibility of the Public Accounts Committee aided by the Comptroller and Auditor General. This conclusion is rather unexpected because it is evident from the questions asked by the Committee [22] that they regarded much of the work of the Estimates and Public Accounts Committees as of the same nature. What appears to have happened is that the Committee let the fact that the P.A.C. has the further task of supervising the auditing of the departmental accounts convince them that it ought to continue as a separate body. However, the two Committees were merged during the Second World War and there seems no reason why the supervision of auditing should not be made a subsidiary function of a new Expenditure Committee.

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[13] para. 21, and see pp. 26, 171, and 259.

[14] para. 12.

[15] para. 25.

[16] October 21, 1969 (H.C.Deb., Vol. 788, col. 968).

[17] para. 26.

[18] para. 32.

[19] para. 33.

[20] para. 35.

[21] paras. 36 and 37

The Report is also inconclusive in regard to the continued existence of the specialist committees. In a way this could be taken as an indication of the failure of the Committee to understand the whole trend of events since Plowden. The one lesson which Parliament should be learning is that the supervision of policy and administration, and the control of expenditure, should not be artificially separated—expenditure is normally only incurred in the pursuit of policies even though there are policy or administrative matters in which its importance is minimal. The solution may therefore be found in greater flexibility, perhaps expressed in a willingness to shift around the membership of committees according to the matter being investigated, or, as an alternative to a new Expenditure Committee, the number of specialist committees might be increased to cover the whole of government activity on a functional basis, each committee making use of a pool of M.P.s who specialised in expenditure problems, as the occasion arose. The Government is at present engaged on a review of the situation and the future of the specialist committees and the proposed Committee should be settled during the course of the year.[23]

The Committee also recommended alterations in the Vote on Account procedure which would result in its publication and approval at the same time as the Expenditure White Paper [24]; these have been accepted by the Government.[25] The Committee's Second Report [26] made further recommendations concerning the form and approval of the Defence Estimates (involving the introduction of a Defence Vote on Account) which have also been accepted and Standing Order No. 18 has accordingly been amended.[27]

As is frequently the case the printed evidence is at least as interesting as the Report itself. A more detailed table of contents would be useful but the provision of an index is welcome.

EDMOND MCGOVERN.

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[22] pp. 92–105.

[23] H.C.Deb., Vol. 788, col. 970.

[24] paras. 27–29.

[25] H.C.Deb., Vol. 788, col. 969.

[26] H.C. 411, 1968–69.

[27] H.C.Deb., Vol. 788, col. 965.

The Social Environment of Probationers

From the point of view of the courts and of the makers of penal policy, research into penal treatment is " useful " when it indicates which type of treatment is most likely to be successful for a given type of offender. If we could obtain that sort of information for all offenders and all available methods of treatment the problems of training, allocation of resources, and development research within the penal system would be greatly eased and sentencing would be transformed, without necessarily becoming any easier. It is obvious that all this is something of a penological pipe-dream, for we are still at the very start of the process of gathering information.

Since 1961, the Home Office Research Unit has been engaged on a major piece of research into probation designed to investigate the interaction between type of treatment (for probation officers use no single, standard technique) and type of offender in producing a particular outcome of a probation order. The classification of treatment, using concepts of " support " and " control," and of " individual " and " situational " treatment was the principal subject of the pilot study [1] for the whole project. The main series of studies, known together as the National Study of Probation, takes this further, examines regional variations in probation, and includes a detailed study of male probationers aged between seventeen and twenty-one who were put on probation in 1964.[2] A third element in the project consists of supporting research; reports have been prepared on a number of topics,[3] the latest being Martin Davies' study of *Probationers in their Social Environment.*[4]

This is mainly a descriptive survey of a sample of probationers falling in the same group as those in the main National Study sample, that is, they are males aged between seventeen and twenty-one,[5] and they began their probation in 1964 or 1965. By concentrating on social environment it is especially relevant to " situational treatment," work by the probation officer concerned with the family, work or social group of the probationer. It can also be said to provide some background information for use in preparing a typology of probationers. But it does not, and could not be expected to, offer much guidance for the courts, except perhaps by revealing that as many as 22·9 per cent. of the sample were put on probation by courts which had obtained no social inquiry report, and another 6·1 per cent. after a day-of-hearing interview only.

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[1] SOMPA, *Study of Middlesex Probation Area*, reported in Folkard *et al.*, *Probation Research, A Preliminary Report* (H.M.S.O., 1966).

[2] See *ibid.*, p. 44; one report, Barr and O'Leary, *Trends and Regional Comparisons in Probation* appeared in 1966, and the major report is in preparation.

[3] *e.g.* Barr, *Survey of Group Work in the Probation Service* (1966); Sinclair, *Probation Hostels* (forthcoming).

[4] H.M.S.O., 1969.

[5] Other age-groups are being separately examined; the juvenile group has been overtaken by events such as the Children and Young Persons Act 1969.

Although the use of full reports was increasing at the time of the sample,[6] the figures are disappointing.

The main purpose of the study reported in *Probationers in their Social Environment* was to identify those features of the social background most likely to cause difficulty to the probationer, and so to the probation officer, and likely to be associated with high failure-rate. Information was obtained about 507 men, as to their health, living conditions, work and personal relationships both at home and with friends of both sexes outside the home. The data is analysed to discover the association between various factors and failure-rate [7] and also, rather less successfully, to test the possible connection between delinquent behaviour and "stress." [8] Failure is defined as the commission of a further offence, leading to reconviction, during the first twelve months of the order. It will be appreciated that this sort of failure is not necessarily any commentary on the work of the probation officer. What was being examined for the most part was the association with failure of factors existing at the time the probation order was made. The overall failure-rate was 0·37; as expected, the rate rose with the number of previous convictions.[9]

The most interesting, and in a sense the most reliable, parts of Davies' study deal with the home and working conditions of probationers. So far as the home situation is concerned, a good deal of attention has been given by criminologists to the special problems of the homeless, and to the possible links between overcrowding at home and delinquent behaviour. Perhaps it is not surprising that only 4·9 per cent. of the sample were homeless, of no fixed abode; it would seem to be a factor working against the making of a probation order in some cases. More interesting is the information about overcrowding; a greater proportion of probationers were living in households with serious overcrowding (more than 1·5 persons to each available room) than would be found in the general population, but there was no association between overcrowding and failure-rate. All that could be found was some support for the link suggested by other writers between overcrowding and crimes of violence.

Similarly, when Davies developed a "material stress score" taking account of overcrowding, cleanliness and facilities such as hot water and television, there was no significant association between the resulting score and failure-rate.[10] Of these factors the only one associated with failure-rate at the 0·001 level of significance was the cleanliness of the home. The failure-rate of those whose homes were assessed by the probation officer as having a "good" level of cleanliness was 0·31, which rose to 0·42 where the level was only "fair" and to 0·61 when the level was "poor."

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[6] See Appendix D, Report on the Work of the Probation and After-Care Department 1962–65 (Cmnd. 3107, 1966).

[7] Tables 3.9, 4.17, 5.28, 6.6 and 8.4 summarise the main findings.

[8] Described at pp. 111–116; the "stress score" made use of several factors which turned out not to be statistically associated with failure.

[9] Table 2.18.

[10] pp. 26–38, and especially Fig. 3.8 and Table 3.9.

Although the relationship is not explored statistically, a poor level of cleanliness and order in the home might well be linked with a poor set of relationships within the family, so that the family is not working as an efficient unit. The work of the Gluecks[11] leads one to expect that the cohesiveness of the family and the effectiveness of the parents in support and control functions would be closely associated with the failure-rate. Davies' study bears this out so far as family cohesiveness is concerned,[12] and he has some new light on the parental roles. The relationship between a probationer and his mother was much closer than that between the probationer and his father; but the relationship with the mother, looked at in terms of affection or parental control, had no significant association with failure-rate, except in the few cases where the probationer was emotionally indifferent towards his mother. On the other hand the father-son relationship was strongly associated with the failure-rate; it "emerges time and again as being a crucial one for the eventual outcome of the order."[13] The quality of the father-son relationship is in turn associated with the state of the marriage and so with family cohesiveness,[14] and it would be dangerous to consider individual factors in isolation.

The interpretation of a probationer's work-record in the weeks preceding the making of the probation order is made more difficult by the very fact of his court appearance and conviction. Dismissal on account of the conviction distorts the picture if what is looked for is the attitude of the probationer to his work.[15] Nevertheless the percentage of the sample who were unemployed when put on probation, 40·4, is very high; its reduction to 12 per cent. after two months on probation is, in part, a measure of success, but is no doubt also the result of the end of the period of waiting and uncertainty associated with the court appearance.[16] As one would expect from earlier studies, the probationer who kept his jobs for very short periods was most likely to be reconvicted.[17] Perhaps more surprising is the high measure of job-satisfaction—64·6 per cent. liked their work "very much"—and the fact that 62·8 felt that if they lost their present job they would obtain another very, or quite easily.[18]

Most of Davies' findings about leisure-time are unsurprising; it is not very novel to learn that probationers go more often to the cinema than to a youth club. Perhaps rather more surprising are the facts that a quarter of the sample stayed at home all weekend, and 4 per cent. went to church. Unfortunately no questions were asked in Davies' questionnaire about Saturday afternoon, so we may be given a false impression by his data on " weekend " activities. More significant may be the probation officers' estimate that 32·6 per cent. of their clients mix mainly with delinquents, 37·8 per cent. mainly with non-delinquents, whilst 27·6 per cent. were " lone wolves." These figures were statistically associated with failure-rate in a way which no leisure-time activities were.[19]

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[11] See especially *Unravelling Juvenile Delinquency* (1950).

[12] Tables 4.3 and 4.17, and p. 56.

[13] p. 55.

[14] See Tables X16, X21, X23, X27 amongst the supplementary tables at the end of the study.

[15] See pp. 59 *et seq.*

[16] Table 5·11, and pp. 65, 68.

[17] Table 5.28.

[18] Tables 5.21 and 5.26; the general employment situation in 1964–65 must be remembered.

Much of Davies' study is based on the assessment made by probation officers. As he admits, their assessment of the probationers' personality characteristics in terms of inadequacy or disturbance [20] cannot be regarded as reliable. So far as relationships with friends were concerned, the officers regarded most male friends as wielding a bad influence on their clients, but girl-friends were usually seen as an influence for good, and this last observation is not borne out statistically.[21] On the other hand the officers' assessment of the initial relationship between themselves and their clients was strongly associated with failure-rate; as expected, sullenness and hostility are associated with failure of probation.[22]

One of the homely truths which makes delinquency such an intractable problem—and research difficult—is that enshrined in the saying that " it never rains but it pours." The most daunting fact which emerges from Davies' study is that probationers so often face multiple problems, or at least that the symptoms appear in so many aspects of the probationer's life. So the personality factors diagnosed by the probation officers are associated with a low level of cleanliness in the home.[23] A probationer from a dirty home is more likely to be unemployed.[24] One who is unemployed is more likely to have mainly delinquent friends [25]; and that fact in turn is often associated with poor relations between the probationer's parents.[26] The key issue for researchers is to discover what methods are most likely to resolve those complex and interrelated problems. But that is another story.

J. D. McCLEAN.

LAW COMMISSION: INTERPRETATION OF STATUTES

WHY can we not simply telephone the Secretary of the Cabinet, and ask him to clear up a doubtful point in an Act? At any rate, while the Government that passed the Act is still in existence.

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[19] Tables 6.2, 6.6 and p. 96.

[20] pp. 21–24; the same applies to assessment of " precipitating factors " at p. 17.

[21] pp. 86, Tables 6.4 and 6.5, and pp. 97–99, Tables 7.1, 7.2, 7.3.

[22] pp. 105–110.

[23] Table X8.

[24] Table X37.

[25] Table X39.

[26] Table X19.

Absurd, of course, but surely only to lawyers. What could be more absurd than the present alternative—years of contest in the courts, at exorbitant expense to the guinea pigs who will only know the answer for certain when the House of Lords have adjudicated the point. And all this with a total ban on any aid, hint or lead from the authors of the Act. Put this way there would seem to be little doubt that it is time for a long, dispassionate look at the way legislation is put into practice.

The Law Commission and the Scottish Law Commission have dealt with one aspect of this problem, but on the whole they have prudently steered clear of wider issues. Their White Paper [1] is a trenchant essay on the shortcomings of the present techniques and rules of interpretation, and a mild rebuke of judges who are still too faithful to the Literal Rule. Its main burden, however, is to make the case for the use of extraneous documentary aids to interpretation, and it does so, I should think, in a way that puts the answer to this long-debated question beyond doubt. Among the recommendations (summed up in draft clauses at the end of the Report) are that courts when interpreting statutes, should be allowed to consider the following:

(a) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;

(b) any relevant report of a Royal Commission, Committee or other body which has been presented or made to or laid before Parliament or either House before the time when the Act was passed;

(c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;

(d) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;

(e) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purpose of this section.

Other recommendations are to establish a presumption that when a statutory duty is created, breach of the duty causing damage to any person will give that person a right of action; and to lay down, as general principles, that the courts should favour an interpretation that promotes the general purpose of an Act rather than one that does not, and that decisions should, in appropriate cases, be consistent with our international obligations. Obviously the most important recommendations are those allowing the use of

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[1] Law Com. 21, Scot. Law Com. 11. H.M.S.O. 6s. 6d.

travaux preparatoires for purposes of interpretation—a step which would not only bring us into line with many other countries but which seems to have wide support in the legal profession. There have been too many instances—and some are discussed in the Report—of freakish decisions arising from the necessity for the judge to work out, but not to find out, what a statute means.

If we can winkle another bit of obsolescence out of the law, so much the better. And since we must accustom ourselves to law reform in small doses, we can only feel grateful to the Law Commissions for lending their weight to these changes. However, as one reads the Report, one waits in vain for something to happen, and ends wondering why so many important questions have not been discussed. Is this all there is to the eternally baffling problems of statutory interpretation? Perhaps we expect too much of the Law Commission. It should not declare more wars than it can wage, and it must obviously move slowly if it is to do more than issue hopeful legal manifestos.

In time, however, somebody will have to tackle the basic question—how long can we sustain the fiction that when the legislature prescribes for a problem, it provides a complete set of answers; and that the court, when confronted with a difficult statute, merely uses the techniques of construction to wring an innate meaning out of the words?

One cannot, these days, approach the problem of statutory interpretation in isolation from the legislative process. And I do not think the proposal to allow the court to consult parliamentary documents meets this objection. As long as the fiction persists that the courts merely "interpret" statutes, Parliament will continue to put out legislation of ever increasing detail and complexity in the belief that it *must* provide a complete set of answers. This is a self-defeating ambition. Where does one look for the intention of the legislature in today's monster Acts, with their flotillas of statutory instruments and schedules, the plethora of boards, tribunals and committees, with delegated powers, which they set up, the myriad of subjects they deal with, their confusing cross-references to other statutes, and their often opaque and tortured language that defies translation into intelligible ideas. What of statutes which are deliberately left vague because it is impossible or undesirable to define their subject-matter: or those—and Parliament passes one every other day—which simply do not add up to a sensible or logical whole. When, last session, Lord Gardiner refused to sanction the printing of part of the Landlord and Tenant Act 1954, as it would be after amendment by the Law of Property Act 1969 (and other previous Acts) because it would be a "perilous undertaking" for Parliament, he was admitting that not even the legislature was prepared to commit itself on what the law meant.

What exactly are the respective roles of Parliament and the courts as regards legislation? Since it is a fiction that the courts merely seek out the legislative intent, there must be a margin in which they mould or "creatively" interpret legislation. The courts are "finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing," said Donaldson J. in *Corocraft Ltd.* v. *Pan American Airways Inc.*,[2] and indeed it is no secret that courts constantly give their own shape to enactments. It becomes important therefore to define the boundaries.

Professors Hart and Sacks of Harvard University have expressed ideas on this which seem to be highly attractive.[2a] They argue that interpretation should not be regarded as a search for the purpose of the legislature or even for the purpose of the statute, but as one of "attribution of purpose." The court, by asking "What purpose do we attribute to the statute?" allows an inquiry into how best the statute can be interpreted and applied, or related to other legislation. What this means is explained by Professor Robert E. Keeton, also of Harvard, in his recent book *Venturing to do Justice*—

> "I do not understand Hart and Sacks to imply that the purpose to be attributed to the statute need be one that was or even could have been consciously formulated at the time the statute was enacted. I understand them to choose this formulation for the very reason that they wish to free the court from the handicaps of dealing with the fiction that the statute contains within it an answer to every question that might arise in its application."

I can hear British lawyers saying that this is all very well for America, but we do things differently over here. However, in this regard, the question is essentially the same for both our systems. There is everything to be said for frankly facing the fact that the courts are in partnership with Parliament in the making of statute law. The strain of the dual role and the pretence that it is non-existent leads to most of the inconsistencies, difficulties and indeed injustices in this area of the law. I do not think it would have been too early for the Law Commission to have considered this point in their Report. After all some statutes do work in just the way described by Hart and Sacks and designedly. By refusing to define "income" in the income tax legislation, Parliament has in fact thrown the burden onto the courts not so much of finding the meaning of the term but of applying it in a host of fact situations.

There are numerous other problems of interpretation that do not seem to be served either by the old rules or the proposed new ones. What can we do when statutes get one interpretation from

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[2] [1968] 3 W.L.R. 714, 732.

[2a] Their work *The Legal Process* which has been more than ten years in preparation, is still not, in the authors' opinion, ready for publication. In spite of this it is gaining a wide reputation. It is obtainable in cyclostyled form in some libraries in this country.

Chancery judges and another from Common Law judges—when both interpretations are permissible? This happened in *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead R.D.C.*[3] where totally opposite stands were taken on whether planning factors should be taken into account when imposing conditions in respect of a site licence. In *Thompson* v. *Stimpson*[4] and in *Schnabel* v. *Allard*[5] there were again completely opposite decisions, depending entirely on a Chancery as opposed to a Common Law viewpoint on the meaning of "not less than four weeks' notice."

How do the present rules help, when a statute passed *ad hoc*, to deal with a situation clearly envisaged by the legislature, is then applied to a whole new state of affairs that were never originally contemplated? *Sweet* v. *Parsley*[6] was a neat example—a law intended to deal with the management of opium dens being adopted to deal with cannabis smoking. The old opium den operator used to supply the den, the hammocks, the pipes and the opium, and was very clearly the culprit sought out by the Act. Cannabis smoking is like cigarette smoking and does not need the paraphernalia of the old opium dens. The House of Lords got around the manifestly unfair decision (a) by saying one must go outside the words of the statute and examine all the relevant circumstances before concluding that Parliament intended to make the offence absolute and (b) by shifting responsibility on to the cannabis smoker, thereby working a neat semantic reverse on the original legislation.

But perhaps the difficulties wrapped up in this question are best exemplified by one of the draft clauses attached to the Report. Since the proceedings of Parliament are too unsure a guide to help the courts in interpreting statutes, the Commissions suggest—

> "Nothing in this section shall be construed as authorising the consideration of reports of proceedings in Parliament for any purpose for which they should not be considered apart from this section."

Here, of all places, looms an interpretation problem of some dimensions. What would happen if the court decides to consider a White Paper, and counsel is debarred from informing it that the Minister decided to reject half the document?

HARRY BLOOM.

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[3] [1965] 3 All E.R. 737.
[4] [1969] 3 All E.R. 500.
[5] [1966] 3 All E.R. 816.
[6] [1969] 1 All E.R. 347.

NOTES OF CASES

Blood Test Evidence

Part III of the Family Law Reform Act 1969 enacts the proposals [1] of the Law Commission on this subject. The date upon which it will come into force has not yet been announced, and in the meantime the courts must struggle with the old law. This was considered by the Court of Appeal in the two recent decisions of *B.* v. *B. and E.*[2] and *W.* v. *W.*[3] The former was a custody dispute in relation to a child born during a first marriage. The wife had remarried, and alleged that her second husband was the child's father. Initially all three adults agreed to have their blood tested. But after the Official Solicitor had been appointed to represent the child, the first husband withdrew his consent, and the Official Solicitor was not prepared to consent on behalf of the child. Baker J. at first instance ordered the child's blood to be tested. In *W.* v. *W.*[3] a husband sought to have the blood of a child born to his wife during the marriage tested in order to establish her adultery. Here husband and wife were willing to be tested and for the child to be tested, but the alleged adulterer could no longer be traced. The Official Solicitor refused to consent on behalf of the child, and his refusal was upheld by Simon P. The Court of Appeal unanimously allowed the first husband's appeal in the former case; and, Lord Denning M.R. dissenting, disallowed the husband's appeal in the latter. Thus in neither case was the court prepared to allow the test.

It must first be noted that in neither case was the refusal based upon lack of jurisdiction to order a test,[4] but instead was rested upon the court's discretion to refuse to direct a test when it would not be in the best interests of the child for it to be tested.[5] This discretion was specifically endorsed by the Law Commission,[6] though in a somewhat misleading way since the argument occurs in a paragraph dealing with the special situation in divorce and nullity suits where there is a danger that mandatory tests would encourage speculative petitions. The conclusion that there should be a discretion to refuse to order a test is, however, in general terms. The Act implicitly accepts this by conferring a *power* upon the court to order a test. There is no direct reference to a discretion to refuse to order a test, and no hint of the grounds upon which it might be exercised.

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[1] Law Com. No. 16: *Blood Tests and the Proof of Paternity in Civil Proceedings.*

[2] [1969] 3 All E.R. 1106.

[3] (1969) 119 New L.J. 1044.

[4] *B. R. B.* v. *J. B.* [1968] P. 466 is now clear authority to support this view.

[5] The question of discretion is most fully considered in the judgment of Sachs L.J. in *B. R. B.* v. *J. B.*

[6] para. 57.

Since the Law Commission and the legislation has concentrated upon reforming the jurisdictional position, the existence as a condition precedent to exercising the jurisdiction of an undefined discretion is a potentially frustrating factor.

Lord Denning M.R. said in *B. R. B.* v. *J. B.* that a test would be ordered " whenever it is in the best interests of the child." [7] The two recent cases carry this a little further. In *B.* v. *B. and E.* some stress was laid upon the presumption of legitimacy. It was quite clear that the presumption operated, and in the absence of blood test evidence could not be rebutted. It was accordingly argued that a blood test must necessarily add uncertainty, since it could not be said in advance of its being taken that it would yield a conclusive result. This argument has the effect of limiting the admissibility of blood test evidence to cases where there is independently of the blood test a chance of the presumption's being rebutted. Thus the ironic situation has arisen that a presumption which was very sensibly used to resolve disputes in the absence of any satisfactory evidence is now being used to justify the exclusion of the only evidence which might be satisfactory. It was this very possibility which led Ormrod J. to remark in *Holmes* v. *Holmes*, [8]

> " When, as I think in these days, it is possible to enable the Courts to do justice on a footing of fact and not to do justice on a basis of presumption, I should myself greatly hope that no difficulties will ever be put in the way of a child's blood being supplied for blood grouping."

This difficulty may be slightly reduced as a result of the reduction in the quantum of proof necessary to rebut the presumption of legitimacy to proof on the balance of probabilities by section 26 of the Family Law Reform Act 1969 which has already come into force. Even so, in a case like *B.* v. *B. and E.*, where husband and wife were cohabiting at the relevant time, it is not easy to see where the degree of doubt to justify the blood test is to come from if it must contribute towards not truth but certainty.

Some members of the court seem to have felt that uncertainty was increased in *B.* v. *B. and E.* because the first husband could not be forced to take a test. [9] This is unconvincing in view of the Court's apparent assumption that a blood test could establish only a negative, or exclusion, result, namely that a given person could not be the child's father. In fact on the basis of this hypothesis, even testing the second husband and the child alone can only increase certainty. This is easily demonstrated. Without any testing, but simply applying the presumption, a clear result is obtained, but it is left completely uncertain who really is the child's father. On the court's hypothesis, testing the second husband and the child will either yield an exclusion result, or it will not. If an exclusion result is obtained, the result is the same as if there had been no testing, but the doubt as to paternity is completely removed since it was accepted that the father must either have been the first husband, or the second. If an exclusion result is not obtained, the result is still the same as if there had been no testing, since no inference adverse to the first husband could be drawn from his refusal to undergo a test,[10] and the doubt as to the paternity of the child remains undiminished. Two complicating factors may help to explain the decision. The first is that the probabilities were here being considered *before* any tests had taken place. In *Re L.*[11] on the other hand, because the adult parties had already undergone their tests, the chances of establishing the paternity of the child were greater than 90 per cent. The court here may have taken an unfavourable view of the prospects of certainty by comparison with that figure. This is, however, to ignore the possibility of blood tests yielding a positive result. In certain circumstances to test the blood of a child and possible father may yield only one chance in 67 million that they are not father and son, without any other man being tested.[12] This possibility is recognised in the Family Law Reform Act 1969 by the enactment of section 20 (2) (*c*) which makes non-exclusion results admissible in evidence. The second complicating factor lies in the positions adopted by the parties. The first husband who was, on the court's hypothesis, the only one who could not be harmed by the administration of the test on the child objected to it, and the mother who could only be harmed by it was in favour of it. If the parties had adopted more appropriate positions and it had been the first husband who was pressing for a blood test the result might well have been different, though it might then have been more difficult for the court to refrain from drawing an adverse inference from his refusing to be tested himself. It is only on some such basis that one can explain Cross L.J.'s explanation for refusing to order a test, that to do so would countenance the mother's attitude towards the question of paternity. Since this seems to have been to try to establish it accurately, it is not clear why the court should not countenance it, nor what it has to do with the interests of the child. It is hard to resist the inference that the court expressed its distaste for the mother's conduct by refusing her request, and ran into difficulty because she happened to be requesting something which could only harm her case.

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[7] [1968] P. 466, 473.

[8] [1966] 1 W.L.R. 187, 188.

[9] *W.* v. *W.* (*No. 4*) [1964] P. 67.

W. v. *W.* proceeds on similar lines, but is remarkable for two further features. First the alleged adulterer was a West Indian and the child in question was markedly darker in pigmentation than the wife's two older children whose paternity was not in dispute.

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[10] *Per* Lord Denning M.R. at p. 1108.

[11] [1969] P. 119.

[12] Law Com. No. 16, App. B, para. 10.

The wife attributed this in part to her own alleged antecedents, and in part to the child's jaundice. Despite this explanation, it might have been thought in view of her admission, at one stage, of adultery with the West Indian, that the question of legitimacy was not absolutely clear.[13] It may be noted that the Law Commission considered that anthropological evidence of this sort might well be more useful than blood test evidence, but felt that the scientific study of it was not yet sufficiently advanced in this country.[14] Secondly, the court justified its decision on the ground that it was for the good of the child that its mother should not be shown to be a liar. This is hardly very convincing since the mother had both admitted and denied the relevant adultery, and was thus shown to be a liar in any event. It is also surely an extraordinary justification for the decision of a court of law that it should be dictated by the necessity of not showing the parties to be telling lies, even though they were. One might even think that the business of the courts in litigation is to detect, and reveal, lies when they are told. It is to such depths that courts must sink when they prefer certainty to truth. It is unfortunate that neither the Law Commission nor the legislature was bold enough to make blood tests mandatory on issues to which the evidence would be relevant, or even to make them enforceable when ordered. Indeed, at present, the still weaker and more unsatisfactory provisions of Part III of the Family Law Reform Act 1969 seem too strong for the administrative stomach.

COLIN TAPPER.

MAINTENANCE AND FOREIGN DIVORCES

IT has not taken long for hardship to result from the present judicial eagerness to recognise foreign divorce decrees. In *Turczak* v. *Turczak* [1] the parties, who were both of Polish origin, married in Poland in 1939. The husband came to England at the end of the war and acquired an English domicile and British nationality. His wife stayed in Poland: and when she later refused to divorce him he started proceedings there himself. On March 15, 1967, the Polish court granted him a decree nisi of divorce on the ground of the parties' long separation. The wife's appeal against the decree was later dismissed, although the appeal court pronounced the husband to be the guilty party. On May 26, 1967, the wife issued a summons against her husband in England under section 22 [2] of the Matrimonial Causes Act 1965, applying for maintenance on the ground of his wilful neglect to maintain her. On October 7, 1967 the Polish decree became absolute. The wife's application came for hearing before Lloyd-Jones J. on March 25, 1969. The learned judge (1) recognised the Polish decree and (2) decided that he had no power to make the maintenance order since the parties were accordingly not married at the date of the hearing. He therefore dismissed the application. Both aspects of this decision seem questionable.

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[13] Unless the absurd *obiter dictum* of Lord Campbell in *Piers* v. *Piers* (1849) 13 Jur. 569, 572 is regarded as representing the law.

[14] Law Com. No. 16, para. 6. Such evidence is admissible in Denmark.

[1] [1969] 3 W.L.R. 1046; [1969] 3 All E.R. 317 (which has a fuller account of the facts).

[2] The relevant provision is s. 22 (1): "Where (*a*) a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or any child to whom this subsection applies; and (*b*) the court would have jurisdiction to

The foreign divorce

At the time of the Polish divorce proceedings Mr. Turczak was a British national who was domiciled and resident in England. The divorce seems to have been recognised on the authority of *Mayfield* v. *Mayfield*,[3] which was also a case of a divorce obtained by a husband-petitioner in a country with which only the wife had the necessary "real and substantial"[4] connection at the relevant time. Recognition of a divorce obtained without the wife's consent in such circumstances seems wrong. It goes far beyond *Indyka* v. *Indyka*.[5] The effect of recognition is that a wife who first applies to the English courts after the divorce is deprived of all her rights to maintenance under English law,[6] because applications under section 16 of the Matrimonial Causes Act 1965 can only be granted on or after an English decree,[7] while applications under section 22 of the same Act and complaints under section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 must be made during the subsistence of the marriage.[8] At the same time, the wife will in

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entertain proceedings by the wife for judicial separation, then . . . the court may on the application of the wife order the husband to make to her such periodical payments as may be just." The application used to be by originating summons in the High Court (Matrimonial Causes Rules 1957, r. 58 (1)): it is now by originating application in the county court (Matrimonial Causes Rules 1968, r. 98 (1)). The change is of no more than procedural significance.

[3] [1969] P. 119.

[4] *Indyka* v. *Indyka* [1969] 1 A.C. 33 (H.L.).

[5] *Supra.* Their Lordships in that case were primarily concerned to extend the bases of recognition of a divorce granted to a wife-petitioner (although some would have accepted a husband-petitioner's nationality as a further new basis). See especially [1969] 1 A.C. 33, 87–88, *per* Lord Pearce, and at 105–106, *per* Lord Wilberforce; *Tijanic* v. *Tijanic* [1968] P. 181 (in which the judgment is entirely based upon the requirement of a connection with the petitioner rather than the respondent); *Peters* v. *Peters* [1968] P. 275, 279, *per* Wrangham J.; J. A. Wade (1969) 32 M.L.R. 441.

[6] *Wood* v. *Wood* [1957] P. 254, 292, *per* Hodson L.J.; *Indyka* v. *Indyka* [1969] 1 A.C. 33, 88, *per* Lord Pearce (quoted in note 12 *infra*); *cf. Schmidt* v. *Schmidt* (1968) 48 D.L.R. (2d) 61 (British Columbia Supreme Court). There would not even be jurisdiction to award her maintenance for the children resident with her abroad, unless they happened to be British subjects and the English courts could be persuaded to give her an order for their custody.

[7] The power arises "on *granting* a decree of divorce or at any time thereafter" (italics supplied). *Cf. Moore* v. *Bull* [1891] P. 279.

[8] A "wife" must apply. "When a question arises . . . of construing the word 'wife' in a statute, everything depends upon the objects of the statute": *Imam Din* v. *National Assistance Board* [1967] 2 Q.B. 213, 218, *per* Salmon

all probability be quite unable to enforce in England any maintenance order which she may have obtained from the foreign court.[9]

One possible solution would be to refuse recognition of a divorce obtained in the above circumstances where the wife would otherwise be deprived of all effective maintenance.[10] The difficulty with this approach is that it produces great uncertainty. As the law now stands, it might well be better to refuse altogether to recognise this kind of divorce.[11] But the best solution is one which Lord Pearce hinted at in *Indyka* v. *Indyka* itself [12]: to give the English courts power to award maintenance on applications made after foreign divorces. Recognition would be more acceptable if the consequent reduction in the number of limping marriages were accompanied by a corresponding reduction in the number of destitute divorced wives.

The time factor

Had Mrs. Turczak issued her section 22 summons *after* the Polish decree had become absolute, her application would clearly have had to fail, for on decree absolute the marriage came to an end.[13] On the other hand, had she got her order *before* decree absolute, her rights under it could have been continued afterwards: for a maintenance order does not lapse automatically on divorce but may afterwards be kept alive in the discretion of the court,[14]

L.J. It is unfortunately too late to say that in this particular context "wife" includes a former wife: too many cases have been decided upon the opposite assumption. *Cf. Pigott* v. *Pigott* [1958] P. 1, 11, *per* Sellers L.J.

[9] The reason is that such an order will not usually be final and conclusive: see Dicey and Morris, *Conflict of Laws* (8th ed., 1967), p. 826. The problem of enforcement has been mitigated by legislation in the case of orders made in Scotland, Northern Ireland, or in one of the Commonwealth countries to which the Maintenance Orders (Facilities for Enforcement) Act 1920 has been extended: *ibid.*, pp. 838–843.

[10] This is suggested by Stephen Cretney in (1969) 119 New L.J. 1121, 1122.

[11] *i.e.* a divorce obtained by a husband-petitioner without his wife's consent in a country with which he has no real and substantial connection (subject of course to *Armitage* v. *Att.-Gen.* [1906] P. 135). A wife-petitioner has less cause to complain of the loss of her maintenance rights, even if the decree is granted on her husband's cross-petition, since it was she who chose to seek a divorce and she who chose the forum.

[12] "[T]he situation between men and women is, for social reasons, inherently untidy in the field of matrimonial jurisdiction. He is in control of her domicile. Moreover, she is frequently dependent on him for the support of herself and their children. If he can . . . obtain a decree which is recognised in this country, it will terminate his matrimonial obligations and debar his former wife from seeking financial relief in our courts. *Unless Parliament introduces some machinery for granting such relief while acknowledging the foreign severance of the marriage tie*, I see no practical means of putting men and women on the same basis with regard to recognition of decrees; and there are other difficulties:" [1969] 1 A.C. 33, 88 (italics supplied).

[13] See text to note 8 *supra.* A marriage continues to subsist until decree absolute: *Fender* v. *St. John-Mildmay* [1938] A.C. 1 (H.L.); *cf. Wiggins* v. *Wiggins* [1958] 2 All E.R. 555.

[14] *Wood* v. *Wood* [1957] P. 254 (C.A.), applying *Bragg* v. *Bragg* [1925] P. 20 (D.C.) to foreign divorces. The decision does not depend upon the concurrence of maintenance jurisdiction in the High Court (and now the county courts) and

and Mrs. Turczak seems to have had a strong case for the exercise of such discretion.

As things happened, Mrs. Turczak's *summons* was issued before decree absolute, but her *order*, had she got it, would have been made after that date. The learned judge held that he could not do this. He pointed out that jurisdiction under section 22 depends on the court having jurisdiction to entertain proceedings by the wife for judicial separation[15]: and because the question of judicial separation could not arise now that the parties were no longer married, he decided that he had no jurisdiction to make the section 22 order. With respect, this does not seem correct. The word "jurisdiction" in section 22 is used in the sense in which it is used in the conflict of laws[16]: "the test is not whether the court would grant a decree for judicial separation, but whether the parties have the requisite domiciliary or residential qualifications."[17] If Mr. Turczak was either domiciled[18] or resident[19] in England at the date of the summons[20] and Mrs. Turczak was then his wife,[21] there was power to make the order even though the parties were divorced at the date of the hearing.

In *Irvin* v. *Irvin*,[22] however, it was held that the offence of wilful neglect to maintain must exist not only at the date of the summons[23] but also at the date of the adjudication. It could be argued that Mrs. Turczak should have failed on the ground that Mr. Turczak was under no duty to maintain her at the date of the hearing, since he was then no longer married to her and no maintenance order was in existence. But this argument seems unacceptable for two reasons. First, it is doubtful whether *Irvin* v. *Irvin* is correct: the decision goes further than is warranted by the authori-

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magistrates' courts: it would apply equally to a s. 22 order: see Dicey and Morris, *op. cit.*, pp. 326–328. As to exercise of the discretion, see *Rayden on Divorce* (10th ed. 1967), pp. 1066–1088.

[15] See note 2, *supra*.

[16] *King* v. *King* [1954] P. 55 (C.A.) (s. 22 jurisdiction although wife already judicially separated); *Hodges* v. *Hodges* [1968] P. 201.

[17] *King* v. *King*, *supra*, at p. 66, *per* Denning L.J.

[18] *Eustace* v. *Eustace* [1924] P. 45 (C.A.).

[19] *Sinclair* v. *Sinclair* [1968] P. 189 (C.A.); *Garthwaite* v. *Garthwaite* [1964] P. 356, 390, *per* Diplock L.J.

[20] "The true rule is 'once competent, always competent'": *Leon* v. *Leon* [1967] P. 275, 284, *per* Baker J.; *Mansell* v. *Mansell* [1967] P. 306; *cf.* *Raselos* v. *Raselos* [1969] 3 All E.R. 929.

[21] See note 8, *supra*. The relevant date must be the date of the summons, as in the case of a summons under s. 17 of the Married Women's Property Act 1882. "Provided that the parties were husband and wife when the summons was issued, then I think that the court has jurisdiction to dispose of the matter, notwithstanding the fact that at any time thereafter that relationship has ceased": *Fribance* v. *Fribance* [1956] P. 99, 102, *per* Barnard J.; *Strachan* v. *Strachan* [1965] 1 W.L.R. 646 (C.A.). The same holds true in a converse situation: *Navas* v. *Navas* [1969] 3 W.L.R. 437.

[22] [1968] 1 W.L.R. 464 (D.C.).

[23] *West* v. *West* [1954] P. 444 (C.A.); *Silverman* v. *Silverman* (1963) 107 S.J. 933; *cf.* *Tulip* v. *Tulip* [1951] P. 378, 388, *per* Birkett L.J.

ties on which it is based,[24] and it seems to be inconsistent with principle.[25] Secondly, even if the decision is to be accepted, Mrs. Turczak's case was completely outside its rationale, which is based on the futility of making an order which would be subject to immediate discharge[26]: for her order would not have been of this kind.[27] It should, therefore, have been enough for her to show wilful neglect to maintain at the date of the summons.

Wrongly denied her married status, wrongly denied her right to maintenance, Mrs. Turczak was a doubly unlucky woman. But her case highlights a problem of general importance: the effect of recognition of a foreign divorce on a wife's financial rights. The problem does not concern foreigners alone: the wife might well be an English woman who is living abroad and who would naturally look to the English courts for relief. The solution lies in Parliament's hands: it is to give the English courts power to award maintenance after a foreign divorce decree.

I. G. F. KARSTEN.

FOREIGN LAND AND ENGLISH EQUITY

IN 1969, after having stayed out of the English law reports for some thirty-two years,[1] the question of the English court's jurisdiction *in personam* to enforce contractual and equitable obligations in relation to foreign land featured in two reported cases, *West (Richard) & Partners (Inverness) Ltd.* v. *Dick*[2] and *Razelos* v. *Razelos*.[3] In the first of these cases, a relatively straightforward one, the court held itself entitled to assume jurisdiction in an action for specific performance of an agreement to buy land situated in Scotland, the defendant purchaser being resident and, it seems, domiciled[4] in England. The second case, *Razelos* v. *Razelos*, raised some rather more difficult and interesting issues.

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[24] *Jones* v. *Jones* (1941) 165 L.T. 398 (D.C.) and *Theobald* v. *Theobald* [1962] 1 W.L.R. 887 (D.C.): but in the former case the wife had lost her right to maintenance before the date of the *summons*, while the latter case relates to the practice of justices to *adjourn* a complaint where it would be idle to make an order which would be subject to immediate discharge.

[25] The wife would be left totally unprovided for in respect of the period after the summons during which she retained a right to maintenance but received none. The decision would encourage delay by a husband and refusal of reconciliation by a wife. It is contradicted by the cases cited at note 23, *supra*, and by the power to antedate orders to the date of the summons (*McLellan* v. *McLellan* [1954] P. 188; *Meyer* v. *Meyer* [1957] 1 W.L.R. 927 (D.C.); *Pigott* v. *Pigott* [1957] 3 All E.R. 432, 435–436, *per* Hodson L.J.; *Bould* v. *Bould* [1968] P. 262, 267, *per* Simon P.). Arrears of maintenance in respect of the period before the hearing during which there was no duty to maintain can always be remitted: *cf.* s. 76 of the Magistrates' Courts Act 1952; *McDonald* v. *McDonald* [1964] P. 1 (C.A.).

[26] *Theobald* v. *Theobald*, *supra*.

[27] See text to note 14, *supra*.

[1] *i.e.* since *Re Anchor Line (Henderson Bros.) Ltd.* [1937] Ch. 483.

[2] [1969] 2 W.L.R. 383 (Ch.D., Megarry J.); [1969] 2 W.L.R. 1190 (C.A.).

[3] [1969] 3 All E.R. 929 (P.D.A., Baker J.).

[4] In the Court of Appeal, Harman L.J. seemed to consider it important, if not essential, that the defendant should have been domiciled in England ([1969]

It arose out of an amended application under section 17 of the Married Women's Property Act 1882, brought by a wife, who was an American citizen, against her husband, who had Greek nationality and (it was assumed) Greek domicile at all material times. After their marriage, the wife had put $100,000 into a bank account in their joint names in Germany. By the amendment to her application, she alleged that the husband had used some of this money to buy two pieces of land in Greece and was now claiming them to be his own, and she sought an order that the land belonged to her.

Baker J. granted the order. In his judgment he accepted as true the wife's allegation that the husband had used money from the joint account to buy the land,[5] and he also found the husband guilty of making a "false and fraudulent" claim.[6] On account of the spouses' Greek domicile, he took evidence of Greek law [7] and found that under that law (a) each spouse of any marriage in which the husband had Greek nationality retained full ownership and administration of his or her property, whether acquired before or after the marriage, (b) a gift of a movable could be completed by delivery without any notarial act and (c) such gift would be voidable if induced by fraud or the threat of violence.[8] But here he found that "there never was a gift" [8] of the money in the joint account, nor was it intended as a dowry, so, as he put it, Greek law "makes no difference." [8] He then justified his assumption of jurisdiction over the Greek land [9] by citing Dicey and Morris's First Exception [10] to their Rule 18 [11] (which is the rule in *British South Africa Co.* v. *Companhia de Moçambique* [12]). The Exception states that where, *inter alia*, the defendant is in England at the time for service of the writ, "the court has jurisdiction to entertain an action against [him] respecting an immovable situate out of England

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2 W.L.R. 1190, 1193). With respect, the previous authorities simply require that the normal rules as to jurisdiction *in personam* be complied with. Even service under R.S.C., Ord. 11, will do; see *e.g. Duder* v. *Amsterdamsch Trustees Kantoor* [1902] 2 Ch. 132.

[5] [1969] 3 All E.R. 929, 933.

[6] *Ibid.* at p. 936. The learned judge also found the husband guilty of "violence and fraudulent dealing" ([1969] 3 All E.R. 929, 933), but this seems to have been in relation to other matters dealt with in the application.

[7] Authority for taking account of foreign law in an application under s. 17 is to be found in *Re Bettinson's Question* [1956] Ch. 67, where the law in question, Californian law, imposed a community of property system on the parties. This case was apparently not cited in *Razelos*.

[8] [1969] 3 All E.R. 929, 933.

[9] *Ibid.* at p. 935. Baker J. also dealt here with an argument that the opening words of s. 17, which direct the application to be made to a judge in England or Ireland according as the property concerned is in England or Ireland, rule out any use of the section where land in any other country is involved. He rejected this argument by saying that these words merely dealt with "the machinery for enforcing claims in Ireland as distinct from England."

[10] Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), p. 151. This work is hereinafter referred to as "*Dicey and Morris.*"

[11] *Ibid.* at pp. 147–148.

[12] [1893] A.C. 602.

(foreign land), on the ground of either—(a) a contract between the parties to the action; or (b) an equity between such parties. . . ." The learned judge quoted this and held,[13] without lengthy discussion, that since he was prepared to presume the defendant husband to have been in England when the amendment was made raising the question of the Greek land,[14] the Exception furnished him with a sufficient basis of jurisdiction. The remainder of his judgment as regards the Greek land was chiefly devoted to pointing out that, in the absence of evidence that an order in the wife's favour would not be enforced by a Greek court, he should not be induced to refrain from exercising this jurisdiction on the ground that to make an order might be "ineffectual." [15]

On the learned judge's view of the facts, the merits of the case were very clearly on the wife's side, so he had every reason to seek high and low for a basis of jurisdiction. The method by which he found one does, however, have at least two interesting implications.

In the first place, his judgment implies that an application under section 17 of the Married Women's Property Act 1882 is, or can be, an action *in personam*, even though the section is concerned with "any question . . . as to the title to or possession of property." This is in line with Dicey and Morris's relatively broad description of an action *in personam* as "an action against a person with a view to enforce the doing by him of some particular thing" [16] (in the instant case, to hand over property [17]). But it seems, with respect, to render too wide a statement in the current edition of Graveson on *The Conflict of Laws* that "any action brought in English courts for determination of title to property of any kind, real or personal, is an action *in rem* in the sense that the judgment of the court itself constitutes a good title against all the world." [18] Otherwise one apparently has to conceive of the action in *Razelos* as being simultaneously *in personam* and *in rem*, which is an inconvenient result.

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[13] [1969] 3 All E.R. 929, 935.

[14] The husband had been in England when the summons on the original application was served on him, he had appeared thereto, and there was no evidence that he was *not* in England when the amendment was made.

[15] *Ibid.* at pp. 935–936. The cases cited by the learned judge (*Tallack* v. *Tallack and Broeckema* [1927] P. 211, *Goff* v. *Goff* [1934] P. 107, *Wyler* v. *Lyons* [1963] P. 274 and *Cammell* v. *Cammell* [1965] P. 467) do not deal with foreign land, but there is authority for saying that in exercising the form of jurisdiction now being discussed, a court should take into account this question of "effectiveness," particularly if some provision of the *lex situs* would actively prohibit enforcement of the court's order. See *e.g. Ex p. Pollard* (1840) Mont. & Ch. 239, 250; *Norris* v. *Chambres* (1861) 3 De G.F. & J. 583, 584–585; *Dicey and Morris*, p. 152.

[16] *Dicey and Morris*, p. 169. *Cf.* a similar description in Cheshire, *Private International Law* (7th ed., 1965), p. 76. It is probably correct to classify this form of application as an "action"; its matrimonial flavour does not prevent this (*cf. Rayment* v. *Rayment and Stuart* [1901] P. 271, 286).

[17] It is assumed that Baker J.'s order was along these lines. The report does not make it clear.

[18] Graveson, *The Conflict of Laws* (6th ed., 1969), p. 110.

The second, and more important, issue arising out of the judgment concerns the actual application of Dicey and Morris's Exception, which we may call the rule in *Penn* v. *Lord Baltimore*,[19] to the facts of the case. This rule is generally recognised as covering three classes of case[20]: (1) contracts, (2) trusts or other fiduciary relationships and (3) fraud or other unconscionable conduct. It may be that Baker J. considered the case to fall within class (3) by virtue of the husband's fraud, in which event he would be fully in line with authority[21] in utilising an English concept of " fraud " and granting relief as indicated by English rules of equity. But his insistence that " there never was a gift "[22] of the money in the joint account suggests that he may have thought of the " equity " required in Dicey and Morris's formulation as arising out of a resulting trust binding the husband to hold the money as a co-trustee for the wife. If this is so, the case falls within class (2), and it is respectfully submitted that, strictly speaking, the learned judge should have made a further reference to Greek law when he came to decide whether the wife's deposit of the money could, and on the particular facts would, give rise to something equivalent to a resulting trust.[23] No doubt the urge to apply the *lex fori* to this issue was strong, because the jurisdictional rule is framed in terms of " equities," which only exist in common law systems and have a purely English origin. But if the trust were express, its validity would clearly have to be measured by its own governing law[24] and not the *lex fori*, and there is no reason why a different approach should be applied in the case of trusts or similar legal relationships arising other than by express words. Although this particular submission is not, so far as the writer is aware, directly supported by English authority, it is to some degree borne out by two Canadian cases, *Purdom* v. *Pavey & Co.*[25] and *Gorash* v. *Gorash*,[26] and by some remarks of Beale.[27]

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[19] (1750) 1 Ves.Sen. 444.

[20] See *e.g. Companhia de Moçambique* v. *British South Africa Co.* [1892] 2 Q.B. 358, 364, *per* Wright J., and the well-known dicta of Parker J. in *Deschamps* v. *Miller* [1908] 1 Ch. 856, 863.

[21] *E.g. Cranstown* (*Lord*) v. *Johnston* (1796) 3 Ves. 170; *Mercantile Investment & General Trust Co.* v. *River Plate etc. Co.* [1892] 2 Ch. 303.

[22] [1969] 3 All E.R. 929, 933.

[23] Under English law itself, this may necessitate a fairly close examination of the facts; see *e.g.*, *Re Young* (1885) 28 Ch.D. 705; *Re Bishop* [1965] Ch. 450 and *cf. Marshal* v. *Crutwell* (1875) L.R. 20 Eq. 328.

[24] In cases where the trust is directly imposed upon land, this law is generally the *lex situs*; see *e.g.*, *Nelson* v. *Bridport* (1846) 8 Beav. 547 (testamentary trust void under *lex situs*); *Re Fitzgerald* [1904] 1 Ch. 573, 588 (C.A.), *per* Cozens-Hardy L.J. (provision in marriage settlement void by *lex fori*, valid by *lex situs*). Although these cases did not involve the rule in *Penn* v. *Lord Baltimore*, it is hard to see why the position should be different when the rule is used.

[25] (1896) 26 Can.S.C.R. 412 (Supreme Court of Canada, on appeal from Ontario). Here an Ontario debtor gave a mortgage in fraud of his creditors over land in Oregon. Under Ontario law, a constructive trust would arise in favour of the creditors, but there was no evidence that this was so under Oregon law, the *lex situs* and, as such, the law governing the mortgage The Supreme Court refused to assume jurisdiction under *Penn* v. *Lord Baltimore*.

Greek law is recommended as the appropriate law in the instant case on the footing that the transaction, by analogy to a post-nuptial settlement, should be governed by its "proper law," which should prima facie be the law of the spouses' domicile.[28] An alternative characterisation is that of a particular transfer *inter vivos* of an intangible movable (*i.e.* not a transaction within the field of marital property law [29]), in which case it could be again submitted that the "proper law" should govern,[30] though arguments in favour of the *lex loci actus* (? German law), the *lex domicilii* (Greek law), and even the *lex situs* (? German law again) could be maintained on the notoriously devious authority of *Republica de Guatemala* v. *Nunez*.[31] But it is not proposed to delve further into this tricky question of choice of law, or indeed to suggest that Baker J. would necessarily have reached a different result in *Razelos* if he had followed these leads. The point is sufficiently made if there is an increased appreciation that, despite early dicta which may appear to imply otherwise,[32] the assumption of jurisdiction under the rule in *Penn* v. *Lord Baltimore* [33] does not automatically justify the wholesale application of English law to the case in question,[34] except only where fraud is present. To put it another way, the "conscience" jurisdiction of Chancery is adequately preserved so long as English law is applied in the fraud cases; there is no need to give English law a wider range of operation.

M. R. Chesterman.

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[26] [1949] 4 D.L.R. 296 (Supreme Court of British Columbia). Here the Court assumed jurisdiction under the rule to enforce an implied trust arising out of an agreement to purchase land in Alberta in equal shares. It was considered significant that the law applied, British Columbia law, was not only the *lex fori* but also the law governing the parties' agreement.

[27] (1906–07) 20 H.L.R. 382, 387–388.

[28] See *Dicey and Morris*, Rule 110, Sub-Rule 1, p. 631, and comments thereon.

[29] *Cf.* Vaughan Williams L.J.'s holding in *Re Martin* [1900] P. 211, 240 (C.A.), that the question of revocation of a will by marriage is a matter of matrimonial law, not testamentary law.

[30] See *Dicey and Morris*, Rule 84, p. 562 (though it is expressed as dealing with "intrinsic validity") and *Campbell Connelly & Co. Ltd.* v. *Noble* [1963] 1 W.L.R. 252, in so far as it deals with the *interpretation* of an assignment of copyright.

[31] [1927] 1 K.B. 669.

[32] Notably in *Ex p. Pollard* (1840) Mont. & C. 239, 250.

[33] (1750) 1 Ves.Sen. 444.

[34] In *West (Richard) & Partners (Inverness) Ltd.* v. *Dick* [1969] 2 W.L.R. 383, this point was well appreciated by Megarry J. at first instance. He took full account of Scottish law, the *lex situs*, and was aware that, had the matter been raised by counsel, he would have been bound to consider the proper law of the contract of sale (see his judgment at pp. 385–386). The same point is made in Graveson, *loc. cit.*, at pp. 142, 144.

Costs and the Do-It-Yourself Litigant

Mr. Robin Buckland sued both his solicitor and his surveyor for their part in advising him in the abortive purchase of a house. He conducted his case himself and in the Court of Appeal [1] was successful against the surveyor but, though considerable reservations were expressed by all three judges about his solicitor's conduct,[2] the latter was not held to have been negligent. The present case *Buckland* v. *Watts* concerned Mr. Buckland's claim for costs.[3] Here the Court of Appeal held that though a solicitor conducting his own case would have been able to claim costs for his professional services reasonably incurred, the same does not hold good for a lay litigant.

The Court of Appeal based its decision on the case of *London Scottish Benefit Society* v. *Chorley* [4] though, as Danckwerts L.J. recognised,[5] that decision was not entirely relevant since it dealt with the position of the solicitor-litigant. In fact, until *Buckland's* case there does not seem to have been a single decision on the point of costs and the lay-litigant in person.[6] It is true that all the cases have treated the solicitor-litigant as an exception to the otherwise general rule denying costs to a litigant in person [7] but, since this latter rule has never been expressly formulated, it is instructive to examine the reasons for the exceptional treatment of solicitors.

Defence counsel in the *Chorley* case argued that it would be an extravagance to force a solicitor to instruct another to do a job he could perfectly well do himself [8]; the Court of Appeal seemed to accept[9] the contention that if solicitors were an exception to the general rule the cost of litigation would be kept down.[10] Obviously the fewer the persons involved in preparing a case, the cheaper normally will be the overall costs. Provided the case is satisfactorily presented such arguments are therefore incontrovertible.

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[1] *Buckland* v. *Mackesy*; *Buckland* v. *Watts*, *The Times*, October 17, 1968 (C.A.).

[2] "Neither professional man could be proud of his part in the present case, but nonetheless negligence had not been established against Mr. Mackesy" (*per* Harman L.J.). "In the present case the evidence fell short of establishing negligence by Mr. Mackesy—but not far short" (*per* Salmon L.J.) "What had occurred could give the solicitor little pride . . . [he] reached without any enthusiasm the conclusion that Mr. Mackesy was not negligent" (*per* Baker J.).

[3] [1969] 2 All E.R. 985 (C.A.). As explained by Sir Gordon Willmer (at p. 987) this decision did not affect the plaintiff's right to his disbursements or out-of-pocket expenses, it merely precluded him from obtaining remuneration for his expenditure of time and labour in the preparation of his case.

[4] (1884) 13 Q.B.D. 872 (C.A.).

[5] [1969] 2 All E.R. at p. 987 B.

[6] *Cordery on Solicitors* (6th ed.), p. 214. "In ordinary cases a party conducting his own case is, if successful, only entitled to costs out of pocket from the other side." No authority cited, though the *Chorley* case (*supra*, note 4) is cited for the exceptional treatment of solicitors. See generally *Halsbury's Laws of England*, Vol 30 (3rd ed.), paras. 307–309.

[7] The most important cases on the extent of the solicitors' right to costs are *Reed* v. *Gray* [1952] 1 All E.R. 241 (Ch.D.) and *Tolputt* v. *Mole* [1911] 1 K.B. 836 (C.A.). In the latter case the defendant, a solicitor and county court registrar, acted as his own solicitor in an action in which he was given judgment with costs. As registrar he then taxed his own costs, and his right to do so and to receive the costs was upheld by the Court of Appeal. It is interesting that in all the more important cases except *Reed* v. *Gray* the solicitor was the successful defendant: perhaps the weight given by the judges to the need to keep down unnecessary litigation is greater than would appear from the reports.

[8] (1884) 13 Q.B.D. at p. 874.

But why should not the same reasoning be applied to the lay-litigant? Mr. Buckland had been successful in the Court of Appeal[11]; this implies a degree of efficiency which was alluded to by Danckwerts L.J. in the present case when he said "The plaintiff has conducted his case himself in person and he has done it very well."[12] The argument against such allowance had been put, somewhat unconvincingly, by Bowen L.J. in the *Chorley* case.[13] He maintained that while professional skill and labour are recognised and can be measured by the law, amateur legal effort could not be measured. "It depends on the zeal, the assiduity, or the nervousness of the individual." Surely, with respect, this is not the point? Some solicitors take too much trouble, and others very little; it is an everyday task on taxation of costs to allow a reasonable sum for the labour involved. Whilst it could possibly be argued that a lay-litigant should be paid at a lower rate for doing the job that a solicitor is trained to do, there seems to be no justification for refusing any payment to the one but not to the other.

A further point made by Bowen L.J. was that "as a guard and protection against unjust litigation costs are rendered recoverable from an unsuccessful opponent."[14] Brett M.R. likewise said "I should have thought that a person wrongfully brought into litigation ought to be indemnified against the expenses to which he is unjustly put."[15] Clearly both judges were thinking of the successful solicitor-defendant and such comments are not applicable to the present case. Furthermore, both they and Fry L.J. were anxious to point out that this did not involve any special privilege of a solicitor.[16] If this is indeed so it is hardly fair to treat any differently a lay-litigant who has won his case. Such litigation can scarcely be termed "unjust" and yet the losing party has profited by the fact that his opponent could not or would not engage the services of a solicitor.[17]

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[9] Brett M.R. at p. 875: "it would be inadvisable to lay down that [a solicitor] shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor."

[10] In fact Fry L.J. made it the *sole* ground of his decision: at pp. 877–878 he said, "This is not a question as to a solicitor's privilege. I think that the conclusion at which we have arrived will be beneficial to the public because if the rule were otherwise a solicitor who is a party to an action would always employ another solicitor, and whenever he is successful he would recover full costs; whereas under the rule of practice laid down by us, a solicitor who sues or defends in person will be entitled, if he is successful, to full costs, subject to certain deductions, of which his unsuccessful opponent will get the benefit."

[11] *The Times*, October 17, 1968.

[12] [1969] 2 All E.R. at p. 985 G.

[13] (1884) 13 Q.B.D. at p. 877.

[14] *Ibid.* at p. 876.

[15] *Ibid.* at p. 875.

[16] Indeed he was so anxious to put the "privilege" of solicitors at its lowest that Brett M.R. stated the position somewhat inaccurately. In (1884) 13 Q.B.D. at p. 876 he is quoted as saying "The true rule seems to be that when a

The arguments accepted in the *Buckland* case have a great resemblance to those in *Chorley*; they are summarised by Sir Gordon Willmer, "It is because there has been an exercise of professional legal skill that a solicitor conducting his own case successfully is treated differently from any other successful litigant conducting his own case in person. . . . Nobody else, except a solicitor has ever been held entitled to make any charge, as I understand it, in respect of the exercise of professional legal skill."[18]

Apart from the fact that in the present case the question of costs could not have arisen until Mr. Buckland had won his case, a more important point is implied. Solicitors' monopolies have recently been the subject of adverse comment.[19] It is, however, constantly explained that none of these monopolies prevents a person from carrying out the particular task for himself, nor is there any monopoly with regard to the giving of legal advice, even if a charge is made for it.[20] In other words, so far as the law relating to professional monopolies is concerned, there is no difference between a solicitor taking his own case to court and being awarded the costs of its preparation and that of the lay-litigant in person.

If, therefore, the underlying determinant of the present decision was a policy one this should have been stated. It could, for instance, be said that lay-litigants should be encouraged by the costs sanction to employ professional advisers because on the whole the superior presentation of cases which would inevitably result would help to save time and keep down costs.[21] Litigation would thus become a lawyers' monopoly which was enforced by a costs sanction rather than, as with conveyancing, a fine. Of course, this honest formulation of the rule would not necessarily make it any

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solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing *in person*, subject to this restriction, that no costs which are really unnecessary can be recovered." The words in italics are corrected in the *errata* list to "by a solicitor" which gives the rule a somewhat different complexion.

[17] A person of moderate means who is towards or just outside means test limits of the legal aid scheme is in a particularly difficult situation as a result of the present decision. In addition, not only might it be difficult to obtain legal aid for suing a solicitor, but it may also be difficult to find another solicitor willing to take on the case.

[18] [1969] 2 All E.R. at pp. 987I–988. Danckwerts L.J. at pp. 985–987 adopted the judgment of Bowen L.J. in its entirety.

[19] See D. S. Lees, *Economic Consequences of the Professions* (Institute of Economic Affairs, 1966). National Board for Prices and Incomes Report No. 54 (Cmnd. 3529) and report No. 134 (Cmnd. 4217). Zander, *Lawyers and the Public Interest*, pp. 171–184. Abel Smith and Stevens, *Lawyers and the Courts* and *In Search of Justice*.

[20] Johnstone and Hopson, *Lawyers and their Work*, p. 488.

[21] See Megarry, *Lawyer and Litigant in England*, pp. 17–18.

fairer, unless it was discretionary or there were exceptions to it. For instance, what of the legally qualified but professionally untrained law lecturer or the "paper" barrister?[22] Or what of the litigant like Mr. Buckland who seemed to have good reasons for distrusting lawyers and bringing the case himself? Although he had failed in his earlier negligence action against his solicitor none of the judges criticised him for bringing the case.[23] Indeed Baker J. in stating that what had occurred could give the solicitor little pride, gave some details of the unfortunate way Mr. Buckland had been treated.[24] When a lay-litigant's necessarily limited experience of the legal profession is of such a nature it is surely unfair to penalise him for bringing a case for which he does not employ another solicitor?

The case of *London Scottish Benefit Society* v. *Chorley* was decided at a time when the arguments for and implications of restrictive practices were generally not as fully appreciated as today. Moreover the problem of the successful lay-plaintiff in person which was raised by the present case was not fully considered there. Since, therefore, they were not directly bound by the previous decision it is a pity that the Court of Appeal in *Buckland* v. *Watts* did not see fit to give somewhat fuller consideration to the underlying issues.

J. C. HARPER.

TAKING A TAXI-DRIVER FOR A RIDE

PRACTITIONERS tend to deny that the Theft Act 1968 presents difficulties of interpretation. They take what may be called a plain man's view of the Act: its aim and general effect is to provide for the first time a simple scheme of widely drawn offences of dishonesty; doubtless there are some trivial marginal problems, but on the whole it is clear what the Act means; the analytical fantasies of the academics, though amusing, are neither practical nor very respectable. This view has much to commend it. At least one section of the Act, however, requires a different attitude. Section 16 is an ill-conceived provision, introduced in haste late in the passage of the Bill. It demands careful analysis. This it did not receive in *R.* v. *Waterfall*.[1]

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[22] Under the New Scheme of Education and Training certain distinctions are made between those who do and those who do not intend to practise at the Bar. It remains to be seen whether the judges will differentiate between the two "classes" of barrister.

[23] *The Times*, October 17, 1968 (see *supra*, note 2).

[24] Apparently the solicitor had charged for negotiating a reduction in deposit which Mr. Buckland had effected personally, he had charged a guinea for his explanation about Mr. Buckland's complaints of the way he had handled the matter, and finally had tried to make Mr. Buckland bankrupt when he had appealed.

[1] [1969] 3 W.L.R. 947; [1969] 3 All E.R. 1048.

The relevant parts of section 16 are as follows:

> " (1) A person who by any deception dishonestly obtains . . . any pecuniary advantages shall on conviction on indictment be liable to imprisonment for a term not exceeding five years.
>
> (2) The cases in which a pecuniary advantage within the meaning of this section is to be regarded as obtained for a person are cases where—
>
> (a) any debt or charge for which he makes himself liable or is or may become liable . . . is reduced or in whole or in part evaded or deferred; . . ."

The meaning of these provisions is obscure, but their form is clear. The offence is committed by the dishonest obtaining by deception of the reduction, or the total or partial evasion or deferment, of a debt or charge for which a person makes himself or is or may become liable.

Mr. Waterfall arranged with a taxi-driver to drive him from Southampton to London for an agreed fare of £14. But he had not the means to pay and was unable to raise the money when he and the driver arrived in London. He was convicted of an offence under section 16.

Mr. Waterfall's case was that he believed that, on arriving in London, he would obtain from his accountant the money to pay the fare. This claim was treated as going to the issue of dishonesty. The Deputy Recorder wrongly told the jury to consider, on that issue, not only whether the accused did hold the belief he claimed to hold but also whether he had reasonable grounds for that belief. The conviction was quashed by the Court of Appeal (Criminal Division) on the short ground that a purely subjective test should have been applied.

Before coming to the ingredient of dishonesty Lord Parker C.J. dealt briefly with other aspects of the offence:

> " . . . it was quite clear that there had been an obtaining of a pecuniary advantage, in that the appellant had made himself liable to a debt which he had evaded. Secondly, it is perfectly clear that he did that by deception; . . . the conduct of taking a taxi in those circumstances [was] such as to convey that he had money to pay. . . ." [3]

This passage should mean that the appellant had by deception evaded a debt for which he had made himself liable. It would not be adequate to say that he had made himself liable to a debt which, incidentally, he had evaded. For evasion of a debt is a pecuniary advantage within the section, while the creation of a debt (or credit) is not; so it is the evasion which must be obtained by deception. But since the deception did obtain the taxi-ride and thus the creation of the debt, it is surely arguable that the evasion of the debt was *not* also obtained by the deception—that it is going too far to say that the same deception obtains both credit and non-payment. No doubt the section is intended to do all the work formerly done by the offence of obtaining credit by fraud; but Parliament's intention is hard to reconcile with its language.[3] It is a pity that the Court of Appeal did not remark upon the difficulty and offer a more elaborate account of its resolution.

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[3] [1969] 3 W.L.R. at p. 948; [1969] 3 All E.R. at p. 1049.

The assumption that Lord Parker was referring to an *evasion* obtained by deception is in fact rendered questionable by two considerations. The first is that the particulars charged in the indictment[4] were, remarkably, that " he . . . dishonestly obtained for himself a pecuniary advantage, namely that of *incurring a debt* . . . by the deception that he was in a position to pay. . . ." " Incurring a debt " is not a pecuniary advantage within the section. Yet no one appears to have commented on this error at the trial[5] or on the appeal. It is therefore possible that the passage quoted above is an incautious adoption of it. Secondly, the conviction was quashed on the ground that the jury might, properly directed, have found that the appellant believed he could find the money in London. This would have amounted to a finding that he did not intend to evade payment. It follows that the more charitable reading of the judgment—as referring to an evasion obtained by deception—produces the decision that by deception as to one's ability to pay one may unintentionally evade payment. It is possible to think of facts which might illustrate this. But they are not, it is submitted, the facts of this case.

On the present facts it was very possibly an error to treat the appellant's asserted belief as going to the issue of dishonesty. The court first identified a deception (which must be " deliberate or reckless ": sections 15 (8) and 16 (4)), and then held that, despite that deception, the appellant may not have been dishonest because he may have thought that he would be able to pay. This is new doctrine. It seems inconsistent with pre-Act authority to the effect that knowingly to induce a person by deception to put his property at risk is fraudulent.[6] If Mr. Waterfall was not knowingly putting the driver's time and services at risk—if he felt *sure* that he would be able to pay at his destination—where was the deception? The implied statement " that he had money to pay " would not then be deliberately or recklessly inaccurate.[7] (Only an express statement "I have the money in my pocket" would in that situation be deceptive—and would illustrate the curious situation referred to at the end of the last paragraph; but the evidence did not clearly establish such a statement.) On the other hand, anything less than complete confidence in the ability to pay would involve the knowing subjection of a deceived driver to the risk of non-payment. Surely this is dishonest?

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[3] *Cf.* Elliott, " Obtaining Credit by Fraud " [1969] Crim.L.R. 389; Griew, *The Theft Act 1968*, p. 94 (but the text above reveals the author's serious doubts about case (5) at p. 95).

[4] I am indebted to Mr. P. K. L. Danks, chief prosecuting solicitor to the Hampshire Police Authority, for a sight of the short transcript of the trial.

[5] The language of the indictment harks back to the offence of obtaining credit by fraud. The Deputy Recorder told the jury that for that offence " a new offence has been substituted . . . , which comes, in fact, to much the same thing." There is an unfortunate tendency to assume this. Anyone who would wrestle with the grammar of s. 16 must first exorcise the ghost of the Debtors Act offence and abandon its language.

[6] See *e.g.*, *Naylor* (1865) L.R. 1 C.C.R. 4; *Carpenter* (1911) 76 J.P. 158.

The decision is also at odds with controversial larceny cases which held that a taker of cash acted "fraudulently" even though he expected to be able to repay and intended to do so.[8] As the word "dishonestly" now appears in the definitions of theft and obtaining property by deception, the Court of Appeal casually sets off a riot of speculation on *Waterfall's* implications for the Theft Act generally.

EDWARD GRIEW.

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[7] Unless it be thought that the act of taking a taxi implies the statement "I have the money in my pocket" rather than the statement "I shall pay on arrival." Taking a taxi home, intending on arrival to go indoors for the fare, is surely a common enough practice.

[8] *Williams* [1953] 1 Q.B. 660; *Cockburn* [1968] 1 W.L.R. 281.

REVIEWS

Books in the Dock. By C. H. Rolph. [London: André Deutsch. 1969. 144 pp. (with index). 25*s*.]

The Obscenity Laws: A Report by the Working Party Set Up by a Conference Convened by the Chairman of the Arts Council of Great Britain. [London: André Deutsch. 1969. 124 pp. 40*s*.]

The End of Obscenity: The Trials of Lady Chatterley, Tropic of Cancer and Fanny Hill. By Charles Rembar. [London: André Deutsch. 1969. 528 pp. (with index). 63*s*.]

A Long Time Burning: The History of Literary Censorship in England. By Donald Thomas. [London: Routledge & Kegan Paul. 1969. 546 pp. (with index, appendices and plates). £4.]

The debate on censorship shows little sign of abatement, in spite of appearances, in either Britain or the United States. The tide of legislative (in the former) and judicial (in the latter) development of the obscenity laws, so strong a decade ago, seems now to have run out and reaction set in. This can be seen in the weekly, almost daily, reports of prosecutions, seizures, police harassment, vigilante action throughout the U.S., where the Supreme Court has refined the law almost to vanishing point, and in a distinct hardening of official and police attitudes in Britain, where the law had advanced only a little from its original crudity and where the liberalisation depended, as it does here in so many fields, on the discretion of the authorities and their sensitive response to the public feeling. It is significant that two of the three English books under review are concerned with the reform (*i.e.*, liberalisation) of the obscenity laws and there is virtually no serious U.K. literature putting the opposing view; while Mr. Rembar's book, which describes his successful fight to liberalise the U.S. law, can be set against a growing body of writing which is examining the limits of liberalisation with some acuity (*e.g.*, H. M. Clor, *Obscenity and public morality: censorship in a liberal society*, Chicago 1969, and R. H. Kuh, *Foolish figleaves? Pornography in—and out of—court*, New York 1967). In both countries, however, the debate is taking place on the foundation of the "deprave and corrupt" principle (in one or other of its variations) and this is bound to falsify the argument unless, as in Denmark and Sweden, one accepts the implications of that approach and reaches a conclusion on the basis of what scientific evidence of corruption there may be. In both those Scandinavian countries a careful examination of such evidence by four recent committees—two on film censorship (*Betænkning om filmcensur*, Copenhagen 1967, bet.nr.468; *Filmens inflytande på sin publik*, Stockholm 1967, S.O.U. 1967:31, interim report; and *Filmen—censur och ansvar*, Stockholm 1969, S.O.U. 1969:14, final report) and two on the laws of obscenity (*Straffelovrådets betænkning om straf for pornografi*, Copenhagen 1966, bet.nr.435; and *Yttrandefrihetens gränser: sårande av tukt och sedlighet; brott mot trosfrid*, Stockholm 1969, S.O.U. 1969:38)—revealed no valid justification for a criminal offence based on corruption of adults. However, the Swedish report on freedom of expression did not stop there, but went on to examine carefully the question of public decency—to such effect that it recommended the creation, in total substitution for the present law, of an entirely new offence based on breach of the general sense of decency ("*den allmänna känslan för anständighet*").

Hints of a move in this direction have emerged in recent English writing (and American: see, for instance, Clor's book mentioned above), beginning with a seminal leader in *The Times* a few years ago. A reference to that leader in his very last paragraph, and the related last chapter (1½ pages long), is the most valuable feature in C. H. Rolph's *Books in the Dock*; and it is because the present reviewer is convinced that only when debate is joined on that issue—decency or reticence or (in a real but particular sense) privacy—can any sort of meaningful progress be made, that he tends to discount the analysis of practical and impractical reforms in the English obscenity laws, which forms the kernel of Mr. Rolph's book, as mere tinkering with the problem. The earlier chapters give a brief and superficial history of the obscenity laws in England and an analysis of the present-day position. The book is really a pamphlet and regarded on that level it succeeds in effortlessly and readably bringing together much material relevant to the debate on obscenity. But its real importance lies in that final "Word in Your Ear."

The Obscenity Laws has much greater pretensions. It is the report of a working party set up under the indirect auspices of the Arts Council, and it does not read well. If it had been written by a single author as a polemical tract, its argumentative and frequently sarcastic tone might have been more acceptable; but even then its single-minded unawareness of issues and systematic devaluation of opposition arguments ensure that it should fail to convince anyone not already converted or deceived by the "report" style in which it is set out.

This said, one can nevertheless welcome the wholesale attack on the "deprave and corrupt" doctrine which, riddled with inconsistencies as it is, lends itself well to this kind of treatment. And, still more important, the conclusions reached by the working party are strong and justified, and lead it to recommend that the obscenity laws should be repealed altogether rather than patched up or amended. That is precisely the goal indicated by the vastly more sophisticated Danish and Swedish reports, and the working party even hints at the more complex Swedish solution by proposing, in its draft abolition Bill, an offence of exhibiting indecent articles etc. in a public place. More than two-thirds of the book as published consist of appendices which contain, *inter alia*, summaries of discussions with or statements from a number of people, the most useful being the statements by Dr. G. B. Barker on the medical aspects, Professor R. M. Jackson on the criminal law, and by Jean Straker describing in some detail his own brushes with the police and the courts.

The working party derived some fun from the thought that a Treasury counsel, in recommending prosecution of books for obscenity, used as his test whether the book had made him feel randy. In the U.S.A. such a test would be precisely the one to meet Justice Brennan's definition of obscene matter as that which tends to arouse sexual desires or sexually impure thoughts. That was in the *Roth* case (1957), the first decision on obscenity to be given by the U.S. Supreme Court and the starting point for much subsequent development and refinement. In that case the court consecrated a departure from the old Hicklin rule, replacing it by a new definition: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests," while earlier in the judgment the court described the constitutional status of obscenity: "All ideas having even the slightest redeeming social importance . . . have the full protection of the [constitutional] guaranties . . . But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The End of Obscenity is the account, by an attorney, of how he built upon the "redeeming social importance" phrase from *Roth*, through a series of cases in state and federal courts relating to *Lady Chatterley's Lover*, *Tropic of Cancer* and *Fanny Hill*, so as finally to persuade the U.S. Supreme Court to incorporate it as an essential element in the criminality of obscene material. The book is exemplary. Apart from giving long extracts from court transcripts of examination and cross-examination of witnesses, which always makes for enjoyable reading, the author, who has an engaging style, charts clearly and easily the conceptual journey he undertook in such a way that the reader always knows exactly what the issues are and at the same time is made aware of the many pragmatic factors which affect the situation. Indeed, not the least of the book's virtues is the picture it gives of the personalities and relations of the legal and administrative characters involved. Also, and no less important, the author continually inserts footnotes or short passages to explain points of procedure or trial tactics, which makes it very easy to follow the to and fro of legal argument in unfamiliar American courts. For, of course, it is the gradual but inevitable development of some extremely subtle legal concepts that is the essence of the book, and this development is revealed primarily through the trials themselves, as conducted by a person who, at least in retrospect, was very much aware of his ultimate aim and of the fact that it could be attained only gradually through a whole series of legal actions. Legal practitioners are seldom so articulate about the cases in which they have been involved. Not only has it been a pleasure to read this book, but after having done so the reader knows and understands much more about the law of obscenity and the more gentlemanly aspects of United States court practice.

The last book in this batch, *A Long Time Burning*, differs from the other three in that it is not restricted to obscenity, but covers all aspects of restriction on freedom of expression, and that it is a scholarly work and a history. In its early chapters it travels over well-trodden ground, covered mainly by the excellent American histories such as Siebert's *Freedom of the Press in England 1476–1776*. But the Americans naturally enough tend to lose interest in England as soon as the Revolution is reached, and there have not been any equally thorough accounts to take the story through the two succeeding centuries, if one excludes St. John Stevas' rather more rapid excursus. Mr. Thomas therefore fills a gap, and fills it admirably; he even succeeds in covering the early ground freshly. The 318 pages of the history are packed tight with information, well organised and vividly told; and the author has had the inspiration to devote a further 200 pages to appendices in which he has set out verbatim extracts from banned or prosecuted books as well as from statutes, trials, reports and other official or semi-official documents. These appendices make up an invaluable collection which will be of great service to anyone considering the subject in the future. The book as a whole is bound to remain a standard work for a very long time.

Neville March Hunnings.

OUTLINES OF MODERN LEGAL LOGIC. By ILMAR TAMMELO. [Wiesbaden: Franz Steiner. 1969. 167 and xv pp. Soft cover DM. 39.]

To do good, logic, like whisky, should be consumed in small doses. And, like whisky, logic is an acquired taste even though it appeals to natural appetite. Add to these two views the opinion that adverse attitudes to logic in the service of law are not uncommon and one sees at once why a book with the aim "to help lawyers to an overall grasp of fundamentals of logic and to its application to legal matters" (p. xiv) ought to be written with pedagogical tact and psychological delicacy. These two qualities, however, are not common among apostles of logic. Conscious of bringing Good Tidings to the people sitting in darkness they tend to be preoccupied with proclaiming the message and make little effort to ensure that it is appreciated and liked. They are exposed to the temptation of assuming that, since thinking logically is natural to man, logic needs chiefly exposition. If they give way to the temptation they are likely to deluge the reader with tubfuls of the potent draught. The intended beneficiary gets soaked but this will do him no good since the stuff must be imbibed.

I fear that Dr. Tammelo, Reader in International Law and Jurisprudence at Sydney University, has not been successful in overcoming this temptation. Probably his problem was not psychological weakness but an uncertainty about what this book is for. In different places he characterises his aim in various ways. The title makes one expect a bird's-eye view of the subject; indeed, there are several useful bits of surveying here. But perhaps because the author rightly fears that bird's-eye views tend to produce bird's-size brains he is intent on presenting his subject in depth. So elsewhere he refers to his work as "an introductory compendium" (p. vi). But this label is puzzling. If one is trying to introduce a novice to a new discipline, one must neither frighten him off with condensed views and a plethora of technicalities nor plunge him in at the deep end. However, if one intends to produce a compendium, condensation, technicalities and depth are essential.

There is another difficulty for a work like this. As we are told, "there is no complete agreement about what 'logic' means even among logicians" (p. xi). One reason for this lack of unanimity is that "logic" is an ambiguous term. Its meaning depends on the context which is determined by the purposes of the user. He could be interested in logic as a theoretical discipline and mean by "logic" "a discipline of thought concerned with thought-formation" (p. xi). Or he could be interested in logic as a practical pursuit and mean by the term "ability in argument." With only limited space at his disposal an author must choose between these mutually exclusive alternatives. If he wants to present lawyers with "exposition of general as well as legal logic" (p. xiv) he will have to write one kind of book. But if he wishes to make a case for "the submission that logic does have some significant uses in the field of law" (p. 181) a different kind of book will be needed. As my very first quotation shows, Dr. Tammelo tries to achieve both goals and I am left with the feeling that he does not achieve the latter because of the former. His book is like a fervent sermon on the virtues of logical theory which can convert only the converts; the unconverted multitudes will flee in panic at the sight of even the relatively simple symbolic formula * CKKCpqCrsAprAqs (=*e.g.*, if you tell the truth then men will hate you and if you tell lies then gods will hate you. You tell the truth or you tell the lies. Hence men will hate you or gods will hate you).

Not that I object to the use of the "Polish" notation. Having been brought up on it I think that one of the several good things about this book is its choice of this notation in preference to that which the *Principia mathematica* made popular in the English-using world. My complaint is that it does far too little to commend this or any other notation. The author is too deeply immersed in his subject to realise how far back he must start with a beginner and how long it takes before he can ask him to face *CKDpqNqNq (p. 53—reached in 16 pages of exposition of Propositional Calculus; an example would be the reasoning of a counsel arguing that his client's behaviour did not constitute a criminal offence). Yet immersion in the subject is not incompatible with the ability to start where in all probability the reader is—shivering on the bank or even wondering whether to strip at all; E. J. Lemmon's *Beginning Logic*, not mentioned in the Selective Bibliography, is an example of how it can be done.

Another weakness of this book is its tendency to introduce technical terms abruptly. This is perfectly acceptable in a compendium but not in an introductory work. The liberal dishing out of Latin terms is part of the same inability to think of the needs of the novice. Both practices are more likely to put him off than to draw him unless he is like the young lady who praised a lecture enthusiastically: "It was lovely! I didn't understand a word of it!"

So far I have been trying to think of this book as a lawyer not yet convinced that all this symbolic stuff is worth studying. If now I put on my philosophical hat I want to say that in several respects this is an interesting work, particularly in the last chapter "Modern Logic in the Legal Universe of Discourse." Its first four sections seem to be fine pioneering work in English. The preceding two chapters are less original and present a conventional theory of logic. In order to illustrate his general doctrinal points the author uses examples from the lawyer's world. But this blinds him to the fact that these are merely external baits and that he is not likely to be taking his lawyer along with him because the uninitiated person will not be able to follow with ease the logical doctrine which these examples are meant to illustrate. Thus I doubt that a lawyer will be helped towards viewing favourably $\Pi x\mathrm{CF}x\mathrm{NH}x$ because he is told that this may be illustrated by "For all x, *if* x is a trespasser, *then it is not the case that* x is an invitee." In my opinion the first chapter on the so-called "traditional" logic is the least successful part of the book: it crams a lot into little space and does not make a good case for the inclusion of everything. If lawyers and other humans rarely think syllogistically in real life, there is little point in expounding a theory of syllogism at length here. The proffered justification is that "before one may discard traditional logic it is proper to make some acquaintance with it" (p. xiii). This presupposes that one writes for beginners but if the compendium is not primarily written to satisfy their needs one wonders why the stuff to be discarded comes in at all. And there is one bit of conceptual equipment that should have been discarded: the subject-copula-predicate theory of proposition.

Although I believe that logic is an indispensable subject for all specialists —lawyers, scientists, theologians and others—I would hesitate to recommend this book to any beginner in this subject. There is no need to hesitate about recommending it to others—should they need it—although even they will do well to bear in mind what John of Salisbury wrote about logic for logic's sake in the twelfth century: "Logic . . . by itself remains bloodless and barren."

LUBOR C. VELECKY.

EUROPE UNIFICATION AND LAW. By EDWARD WALL. [Penguin Books Ltd. 1969. 220 pp. 7s. net.]

IN creating the European Common Market the member States in many respects built anew. Upon their existing national legal systems they imposed the structure of the Community's Council, Commission, Court and Assembly and a system of regulations, directives and decisions embodying the rules and orders emanating from the Community.

The central theme of Mr. Wall's book is the relationship which these new forms of government bear to the individual national law of the member States and in particular to the individual rights and liberties enshrined in the national constitutions. In this light it examines, although necessarily in summary form, the salient features of the national laws of each member State and, for reference, includes in Appendices extracts from the Belgian, French and German constitutions. The author shows, for example, how the federal structure of Western Germany creates the special problem of the application of community law in the federated Länder and of how in Italy doubts about the paramountcy of community law over internal law have similarly arisen. An excellent feature of this discussion is the way the author outlines in the case of each country the history of its constitution and its struggle for individual liberties. An English reader possessed of a somewhat insular attitude will therefore perhaps be surprised to see that he is not alone in having won personal liberties which he now rightly cherishes: that the subjects of the member States of the Community have, in one form or another, the same and occasionally better guarded liberties which they have every intention of preserving within the European Community. And to put the matter even more into perspective the author shows how national sovereignty—looked at in the context of the European Convention on Human Rights, of OEEC as well as of the EEC itself—has increasingly been pooled with that of other nations for the greater benefit of all.

In developing these themes the author has performed with consummate success a much needed service.

PETER KEENAN.

CRIMINAL LAW. Second edition. By J. C. SMITH and BRIAN HOGAN. [London: Butterworths. 1969. 565 pp. Hard cover £4 8s. 0d. Soft cover £3 10s. 0d.]

THE original appearance of *Smith and Hogan* in 1965 was an event of major importance which, oddly enough, went unnoticed in this *Review*. The book is still not sufficiently appreciated outside the universities: "What is 'Smith and Hogan'?" has been heard to escape the lips of practitioners in the criminal courts, for all the world as though the reference were to some forgotten Divisional Court authority. It is certain on the other hand that the judges are not all ignorant of the book and its merits. One High Court judge has confessed that he reads it under the bed-clothes the night before a summing-up, and—"I never go wrong!" The implication is that his Lordship follows the professors' advice. Not so all the judges: see, for instance, *Mason* [1969] Crim.L.R. 449, on indecent assault (and *ibid.*, pp. 447–449, for Professor Smith's revenge). Indeed it does not seem that the judges as a class have yet fully benefited from that all-round education in criminal law now available to them, and to all of us, in the pages of Glanville Williams' *General Part* and *Smith and Hogan*. Perhaps this is not surprising. It is only during the working lifetimes of the present judges that the subject has acquired full academic respectability; it is only since the publication of *Smith and Hogan* that we have had, in an acceptable modern text, a ruthlessly consistent application to the specific crimes of the fundamental doctrines first thoroughly explored in this country by Professor Williams. Perhaps it is too early to expect all the members of an overworked Court of Appeal to have absorbed the full message. For a time it will be necessary to go on teaching the law of the three professors, in despite of some contrary decisions of high authority (see, for example, *Lipman* [1969] 3 All E.R. 410, the latest source of error and confusion in constructive manslaughter).

As a matter of fact manslaughter is one of the few topics on which *Smith and Hogan* cannot, in my view, safely be followed. The authors have restated constructive manslaughter in a way which, on their own confession, produces a prima facie case of manslaughter where "D casts down a banana skin on a public footpath and P slips on it and suffers fatal injuries": for D "committed an offence against the Litter Act 1958 and everyone knows that this act is likely to cause some harm" (p. 221). I thought we had come a little further than that from the pre-*Franklin* conception of manslaughter. It is surely permissible to treat as of general application the court's statement in *Lamb* "that for the act to be unlawful it must constitute at least . . . 'a technical assault'," even if there are some situations which may not be easy to accommodate within this test (the noxious substance left in the cup, for instance). The difficulty of reconciling *Lipman* with this reading of *Lamb* is not to the point: when preparing the present edition the authors had no *Lipman* to perplex them; and in any case *Lipman* goes wrong in other and more fundamental ways, which attention to basic modern teaching should have avoided.

Having offered one criticism and before going on to offer others, it is right to say that this book remains a marvellous statement and analysis of the criminal law. It is impossible to contemplate its having any rival as a prescribed book for university purposes. In a way this is a shame, for the authors, setting out to write a particular book and not some other, provided very little in the way of social or historical background to the law and very little consideration of policy questions. This, combined with a certain absence of grand manner in the writing, gives the book a dry, calculating, technical flavour that is not ideal for the interests of the modern student or the development of future criminal lawyers. Yet with this complaint in one's head, one turns back time after time to the book, and is repeatedly astonished at the learning and ingenuity of the authors and suppresses one's doubt as unreasonable carping.

The task of revision for this edition was very substantial because of the volume and nature of recent legislation, and in particular because of the Criminal Law Act 1967 and the Theft Act 1968. On the whole the work has been done with the competence that one expected. The Theft Act receives a generous ninety-page treatment, which is no mere summary of Professor Smith's monograph on the Act but contains valuable new material. Here and there, inevitably, one finds oneself dissenting. For instance, on the key word "appropriates" in the definition of theft. The word in its context is very baffling. The meaning to be given to it must be consistent with the additional requirement of an intention of permanent deprivation, with the partial definition in section 3 (1) (whatever that may mean) and with section 5 (1) (main definition of "belonging to another"), as well as staying tolerably close to the natural meaning. It is a tall order. I am not greatly assisted in fulfilling it by the authors' conclusion (p. 352) that "An appropriation is . . . some unauthorised dealing in the property which shows that D has assumed the rights of an owner. It is something he ought not [to] have done unless authorised by the owner." I am far from saying that something along the lines of the second sentence cannot be supported as a definition of "appropriates"; but it must be noticed that that sentence is much wider than the first, although the passage reads as though the two sentences are two ways of saying the same thing. Later on in the chapter the authors are altogether too kind to section 16 (2) (*a*) (obtaining pecuniary advantage—see note on p. 217 of this issue).

The innumerable amendments to the text necessitated by the Criminal Law Act seem to have been made with great skill. It is disappointing, though, to find section 4 (assisting offenders) consigned to the end of the book, along with section 5 (the compounding of compounding with misprision), in the chapter on Offences relating to the Administration of Justice. Surely the offence under section 4 is an aspect of participation. It is for teaching purposes. And it is in practice: so often a conviction under section 4 will be merely the best result the evidence will support against a man who was in fact a "principal offender" or "secondary party" (our authors' convenient new labels for participants in crime). Another disappointment is that the new statutory law of alternative verdicts (section 6 (2) and (3) of the 1967 Act) is virtually ignored. Even the availability of a verdict of manslaughter on a charge of murder is only to be collected by inference from the chapter on homicide, although it has been the foundation of so much judicial (and jury) behaviour. There are points at which it is essential to write law at least partially in the light of practice.

Another area much affected by recent developments is that of strict liability. I suspect that the treatment in *Smith and Hogan*, though containing much valuable material (including, now, Professor Smith's valuable riposte to Lady Wootton that the butcher who takes care is to be encouraged to sell meat, even if it is tainted), may be rather confusing for students and that they are unlikely to gather the full implications of *Warner* from its rather breathless treatment at pages 78–79. The word "breathless" also comes to mind in relation to the impeccable treatment of *D.P.P.* v. *Smith*, its aftermath and its present status, at pages 197–199.

Lastly in the way of criticism, I am inclined to offer some sample doubts on matters of content and emphasis. Chapter 1 sets out "to enquire to what ends sentences are directed—or professedly directed—by those who impose them" (p. 4). But I do not see how this can properly be done without a brief account of the methods of disposal available to the courts and of the interrelation of those methods. Secondly, while the sixteen lines on hospital orders (at pp. 128–129) are a welcome innovation, they are, I hope, a mere appetiser; there is room for something more adequate in the next edition. Thirdly, I had hoped to find some speculation on the meaning of death for criminal law purposes, which may at any time become an issue in homicide. The problem is mentioned but passed over as one to which there is, "at present, no certain answer" (p. 188). Fourthly, hopes are unduly excited by a reference to the Model Penal Code on the first page of this edition. There are further references at pages 40 and 141, but I have no note of any others, which is surely a shame. We move towards codification, and students and others might well be directed to consider some of the solutions proposed in the M.P.C. to problems confronting the Law Commission.

Of course there are many points of detail which seem to a reviewer to need correction. But these may be conveyed to the authors more aptly in a letter than in a review which desires to end on the note of congratulation and gratitude sounded at its beginning.

EDWARD GRIEW.

TAXATION ECONOMICS. Edited for the Economic Research Council by M. H. CADMAN. [London: Macmillan. 1969. xix and 101 pp. 45s.]

THE intricacies of tax law are nowadays such that, in endeavouring to become familiar with the mass of rules and the schemes to avoid them, which are no sooner mastered than they become superseded, one tends to ignore the basic economic and social principles and assumptions upon which the rules are, supposedly, founded. This slim volume, originating in a series of five lectures arranged by the Economic Research Council, is most welcome therefore, examining as it does the recent national and international trends in taxation and the effects of taxation on the social and business life of the community.

Professor Ilersic reviews "Past and Current Trends in U.K. Taxation" and suggests what might happen if present trends are continued. So far the book sounds only a warning note. Mr. D. R. Myddelton, writing on the "Social Implications of the Tax Burden in Britain," raises the temperature with a passionate argument advocating, among other things, the abolition of surtax, capital gains tax, selective employment tax, estate duty, stamp duty, betterment levy, the dollar premium and the distinction between earned and unearned income. Furthermore, standard rate income tax should be reduced to four shillings in the pound and local rates and national insurance contributions halved All this is possible, it appears, without even having recourse to a value-added tax and Mr. Myddelton sets out to prove it with the aid of some valuable diagrams, some rather questionable figures and some rather more questionable assumptions. Nevertheless his contribution makes fascinating reading and is full of splendidly quotable comments which will doubtless impress the right audience. Thus, on the subject of estate duty, "the cost of dying has multiplied about fifteen times this century, roughly twice as fast as the cost of living," or the slogan "No progressive taxation without progressive representation."

One returns to earth with Mr. Alun Davies' contribution on "International Trends in Corporate Taxation," in which he points out a number of problems, as yet largely unsolved, which are becoming of increasing importance with the growth of supra-national corporations. This sober and measured analysis ends in a surprising tirade against the Gestapo-like U.S. Revenue investigators, compared to whose tigerish roar the attitude of Revenue officials here is "but a gentle purr."

Mr. W. A. P. Manser examines "Taxation and Britain's International Trading Position." This is an objective and admirably clear assessment, containing some useful statistical comparisons with other countries and a most valuable and interesting appraisal of the suggested Value Added Tax.

Finally Professor Wheatcroft provides a lawyer's contribution with his essay, "A Taxation Policy for Growth." Some readers may already be familiar with this as it has appeared in the *British Tax Review*. In it he sets out what he considers to be the eight major objectives of any tax system, those which any Chancellor will have in mind—the poacher understanding the gamekeeper, or should it be the other way round? What is rather hard to understand is how Professor Wheatcroft reconciles his advocacy of the Value Added Tax with his requirements that taxes should be collected as efficiently and cheaply as possible, that the use of changes in the general rates of taxation as an economic regulator is desirable and that sudden major changes in the tax system are to be avoided. His conclusion, that an egalitarian society is incompatible with material growth, is eagerly endorsed by the editor of the book and by Sir Paul Chambers, who contributes a foreword. It surely depends on what one means by "egalitarian."

A. J. EASSON.

SWEET ENCOUNTER: THE CONFECTIONERY RESALE PRICE MAINTENANCE CASE. By H. CRANE. [London: Macmillan & Co. Ltd. 1969. 216 pp. (inc. index) £8 net.]

IT is unfortunate that the mass of evidence prepared about British industry for the Restrictive Practices Court, most of it admitted in the proof of the principal trade witness, is not normally available to economists and others interested; nor are the proofs of the economists on each side, although these are less likely to contain trade secrets. But now we are indebted to Macmillans for making available the evidence in two cases concerned with resale price maintenance. *Books are Different* contained all the evidence in the Net Book agreement verbatim, as well as ninety pages of introduction and came to 988 pages. Mr. Crane, Internal Legal Adviser to Mackintosh's has managed to condense the evidence in the reference of chocolate and sugar confectionery, a forty-three-day hearing, into 200 smaller pages. He was closely concerned with the case and describes its preparation from the earliest stages in the Summer of 1964 when counsel was consulted about the best way to register each item under the Resale Prices Act passed that July. Much of the book is devoted to a description of the economic case for and against maintaining the resale prices of sweets contained in the proofs of Mr. Wadsworth, the principal trade witness, and Mr. McClelland the economist retained by the Registrar. Both proofs have had to be cut substantially and Mr. Wadsworth's comments on Mr. McClelland's have been interspersed with it. Nevertheless, Mr. Crane has been fair to his adversary. In the following chapter the complex and inter-connected issues, as agreed after the hearing began, are set out and some of the evidence given by other witnesses, such as Dr. Kelvin, an academic psychologist and free-lance consultant in market research, is summarised.

After setting out the judgment verbatim, Mr. Crane comments not only upon some of the court's particular predictions, such as the types of shops that are likely to stop selling confectionery if r.p.m. is forbidden, but also on its procedure; and he suggests some improvements that could be made. The delay caused by reading documents, or parts of them, aloud in court is expensive. He also suggests that it might minimise some of the difficulties that are probably inherent in a complex adversary procedure if the court adjourned for a few days after the close of evidence, being sent a written version of counsel's closing speeches containing references to the evidence, before hearing them orally. Since the respondents do not know what the Registrar's trade witnesses will say, their witnesses may be asked questions on the basis of assumptions that are later shown to be false. Since evidence on some matters of little importance may have to be given by several witnesses, this may seem more important than matters on which a single more competent witness has testified in a line or two. Sometimes in such a lengthy hearing, it is not entirely clear why particular questions were being asked.

Mr. Crane's book is clear, concise and readable, and he has managed to compress a mass of evidence remarkably fairly. Serious students both of the Restrictive Practices Court and of resale price maintenance cannot afford to ignore it. It may be of less value to practitioners advising on whether to defend a reference of r.p.m., since medicaments is the only category not yet heard under the Resale Prices Act 1964; but it should prove of more enduring value to those deciding whether the adversary process of a court of law is better than the inquisitorial procedure of the Monopolies Commission or the National Board for Prices and Incomes in predicting events and making decisions of economic policy.

VALENTINE KORAH.

THE MONOPOLIES COMMISSION IN ACTION. By ALISTER SUTHERLAND, Fellow and Lecturer in Economics, Trinity College, Cambridge. [Cambridge University Press; University of Cambridge Department of Applied Economics, Occasional Papers 21. 1969. 12s. net.]

THE Board of Trade commissioned Mr. Sutherland to analyse the Commission's recent major reports, and this book is based on that study. About half is devoted to its dominant firm inquiries; and Mr. Sutherland considers that generally speaking, the Commission has been fairly consistent in its view of these. But he argues that its finding that Pilkington's monopoly of Flat Glass was in no respect contrary to the public interest is inconsistent with its conclusions that the monopolies of Kodak over Colour Film and of Courtaulds in Cellulosic Fibres were. He also comments on some inconsistencies in the Commission's methods and approach. The author goes on to consider its reports on horizontal and vertical mergers, and finds it difficult to say whether the Commission has been consistent. His criticism of BICC's acquisition of Pyrotenax is very interesting.

Mr. Sutherland concludes that the Commission's general unwillingness to recommend major structural changes—anything more drastic than a quickening of the reduction in tariffs—means that its remedies are unlikely to have a lasting effect. He also criticises it for failing to treat its conclusion whether the "conditions" or "things done" may be expected to operate against the public interest as the lever to trigger off the powers of the Board of Trade. It usually condemns the exclusionary practices adopted by a monopolist of whose conduct it disapproves generally, but not those adopted by those of whom it broadly approves: consequently the Board of Trade has no power to control them.

The paper is excellently timed, covering the last period of the Commission's work after its expansion in 1965 and before it is combined with the National Board for Prices and Incomes. Your reviewer hopes that the latter may include enough material in its reports to make a similar analysis possible in four or five years' time. This is the only critical analysis of most of the Commission's recent reports. It is acute and far too closely written to be summarised in a review and the shortened version published by *The Times* last summer did not do it justice. Mr. Sutherland has made practical suggestions for improving the economic analysis in the Commission's inquiries as well as calling for changes in the legislation making the control of both existing monopolies and large mergers stricter. The book is recommended reading for the London LL.M. and should prove interesting to those interested in business law as well as to those concerned with the United Kingdom policy towards the control of market power.

VALENTINE KORAH.

DIE FLOATING CHARGE—EIN SICHERUNGSRECHT AM VERMOGEN EINER ENGLISCHEN COMPANY. By EDZARD TER MEULEN. [Frankfurt a. M.: Alfred Metzner Verlag. 158 pp. DM. 18.]

THIS short book has been adapted from a doctoral dissertation written by the author, a German practitioner employed by one of the large West German commercial banks. Its purpose is to explain to German lawyers and businessmen the nature, function and effects of the general floating charge on the assets and undertaking of a company under English law, and so to facilitate a comparison with the analogous German institution, the *Sicherungsübereignung durch Besitzkonstitut*, which makes use of the Roman law device of transferring the ownership of property without delivering possession, the *constitutum possessorium*.

The book is comprehensive and detailed in its survey of the present English law governing floating charges and of the juridical developments in the last quarter of the nineteenth century which established the floating charge in England as a recognised form of security. The most interesting part of the book for English readers, however, will be its second part in which the corresponding law of France and Germany is compared in detail with the English rules. The dangers to which a lender who takes a general floating charge on a company's undertaking under German law is subjected are well brought out, in particular the risk that the court might set the whole transaction aside as a fraud on creditors, since there are no means by which public notice of the existence of a general charge on moveables may be given under German law. Also the ineffectiveness of a general charge over raw materials or stock-in-trade purchased by the company on credit are emphasised; this results from the common practice among sellers of goods in Germany of retaining the legal ownership until the purchase price is paid, and of reinforcing this by a charge in favour of the seller on money received by the company upon a re-sale of the goods. It is not surprising in view of these limitations that floating charges in Germany are usually confined to trade debts receivable by the company, and are mostly taken by banks as security for overdrafts.

The author is to be congratulated on writing a well-arranged and readily understood account of the relevant English law, and on making a useful contribution to comparative law in the field of commercial securities for debts.

P. R. PENNINGTON.

THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE. Third Edition. By H. R. HAHLO, Dr. Jur. (Halle), LL.D. (Rand). With an Appendix on Jurisdiction and Conflict of Laws by PROFESSOR ELLISON KAHN. [Cape Town: Juta and Co. Ltd. 1969. xc and 745 pp. (with index). R. 18.00 net.]

THIS book, now in its third edition, has unquestionably captured the home market. The object of the present review is to consider its contribution to comparative studies.

Those familiar with the author's writings have noted his erudition and clarity of expression. His *South African Law of Husband and Wife* further enhances his reputation as a scholar and writer. Of the many qualities of this book its comparative aspect merits a special mention for here we have an example of a branch of South African Law (with its Rhodesian offspring) discussed amidst references to Dutch, English, West European and American law. However, so skilfully has this been done that the reader will never confuse the main with the ancillary text—an objective by no means easy to achieve. I feel this method can be used with advantage by our textbook writers.

As the title indicates the book does not cover all of the family law of the Republic of South Africa. It covers the relations of husband and wife and the relevant rules of the conflict of laws, the latter being contributed by another distinguished writer. In view of this limited scope the size of the book may appear rather excessive but since the body of the law in its historical and comparative setting has been discussed with meticulous care the reader is amply rewarded and the bulk probably justified.

The South African law of husband and wife has its roots in Roman Law and its Dutch adaptation; it is evolutionary as its primitive beginnings have snowballed into the present mixture of the old and new. Not only has this resulted in a considerable complexity of the law (*e.g.*, the property relations of husband and wife take nearly one third of the whole text) but also in the survival of institutions now obsolete or obsolescent in Western Europe. It is not a unitary system because of the territorial and personal divisions. In spite of the frequent excursions into the African native territory the book is on the white man's law and the white law includes racist rules. All these matters are fully discussed and conflicts between the law and life are often shown in their true perspective (*e.g.*, the theory and practice of the marital power). The author does not refrain from criticism and offers solutions to the problems in hand, but the law and the comment are always clearly delimited.

This is undoubtedly a book for the teacher of family law and the student of comparison; a great contribution to the sociology of South African law and family institutions.

D. LASOK.

TRADE AGREEMENTS FOR DEVELOPING COUNTRIES. By GILBERT P. VERBIT. [New York and London: Columbia University Press. 1969. 249 pp. inc. index. 76s.]

THE author of this book writes from his experience as a legal adviser in the Government of the Republic of Tanzania, in negotiating several trade agreements, and from his general practical knowledge of the forms which such agreements should take. Examining the main problems from the angle of the interests of a developing country, he gives a concise and interesting resumé of the workings of present-day multilateral treaties in the economic field and the practical devices and results which are to be borne in mind. This is a *vade mecum* for the international lawyer interested in this area although no orthodox reference is made to specific provisions or decisions, so far as your reviewer can recall.

L. LAZAR.

CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW. Second edition. By EDWARD I. SYKES. [Australia: The Law Book Co. Ltd. 1969. 915 pp. inc. index. Hardback £9 10s. Paperback £8 10s.]

WHATEVER reservations the law teacher may have regarding the use by students of "potted law" served up to them in such compilations (with the result that law libraries are seldom consulted by the students), the reviewer regards the present work as one of the better attempts to assist the teaching of law. The main topics are clearly defined and explained, the extracts are copious and their relevance is generally clear. It is a pity that this work is probably too expensive for general use by British law students.

L. LAZAR.

STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW. By CHARLES L. BLACK, JR. [Louisiana State University Press. 1969. xii and 98 pp. $3.95 net.]

THIS little book contains three lectures delivered by Professor Black at Louisiana State University in the spring of 1968. The author believes that cases ought to be decided on the basis of a judgment as to the requisite conditions for a functioning political system, rather than just by following precedents and interpreting constitutional texts. His prime example is *McCullogh* v. *Maryland*, in which, he says, "judgment is reached not fundamentally on the basis of that kind of textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created." He goes on to consider cases in which this method of decision-making would have produced more orderly and realistic solutions to conflicts between the states and the federal Government. He suggests that, even without the Fourteenth Amendment, the Supreme Court, on this basis, could have used the national structure in the Constitution in order to guarantee civil liberties to the people, and he praises the initiative used by the Court in recent years to develop criminal procedure and to bring it up to date in the interests of personal liberty and security. Professor Black writes attractively, and this fresh and clear re-examination of some classic American constitutional cases is welcome.

D. C. M. YARDLEY.

THE INDIAN ADMINISTRATIVE LAW. By M. C. J. KAGZI. Second Edition. [Delhi: Metropolitan Book Co. (Private) Ltd. 1969. 455 pp. incl. index. $5.50.]

THIS is not an easy book to read. The English is sometimes difficult to follow and the misprints, though they have considerable entertainment value, make reading more like solving a crossword.

The book deals with all the usual topics of administrative law such as delegated legislation, administrative tribunals, redress of grievances, judicial control over administrative action and legal liability of public authorities. The text is almost entirely descriptive with very little evaluation of the law. There are detailed descriptions of various statutory rules, tribunals and public corporations. On the other hand, though there is much repetition of legal propositions, the decisions are often summarised in the text so that it is difficult for someone unfamiliar with them to understand the legal position. This reviewer is not clear for example about the Indian law relating to declarations, error of law or official privilege concerning non-production of documents. The statement of English law relating to successive applications for habeas corpus and limitations of actions against public authorities has not been brought up to date.

The book comes alive in the chapter on delegated legislation where the author subjects the decisions on the constitutionality of delegation to a careful and critical analysis. On this subject he makes an original suggestion for reform, namely that the distinction in the cases between essential and non-essential legislative function is meaningless and that the safeguards against excessive delegation must be political and parliamentary. Other proposals for reform are based on English models. Though India has a written constitution most of the material in this book is familiar to an English reader and very little is new.

G. GANZ.

REPRESSIVE LEGISLATION IN THE REPUBLIC OF SOUTH AFRICA. [Published by the Department of Political and Security Council Affairs. United Nations. New York. 1969. 127 pp. $2.00.]

SOUTH African criminal law is a fascinating and perhaps historically unique experiment in legal engineering. Now an integrated system with a national image all of its own, infused with subtle and novel legal ideas and mechanisms and sustained by a massive corpus of case law, it represents the most systematic effort yet made to throttle off the law by legal process. There is a mania for formal correctness in South Africa. No government pays greater obeisance to the law, holds its judges and courts in greater respect, or is more concerned with legalities. That this is combined with an almost total disrespect for things the law is designed to protect—like the right to a fair trial, or freedom from arbitrary police action,—merely points up the paradox that makes South African law something special.

Mr. Vorster says that South Africa is one of the most stable countries on earth. If so it depends on the legal scaffolding that manages to sustain a régime whose policies are repugnant not only to the outside world but to the vast majority of its own people. It is usually a baffling and elusive task, even to South African lawyers, to grasp the full range of South African racial legislation. The bulk of statutes involved is truly vast, the language used often hopelessly opaque, and amendments and new enactments plop off the end of the legislative conveyor belt in bewildering profusion. (The Suppression of Communism Act has been amended no less than eight times since 1950.)

The situation is now helped by this extremely useful United Nations pamphlet, which presents in summarised form a full collection of all the relevant statutes, together with reliable statistics on their application. The pamphlet does not deal with censorship laws, laws of criminal procedure or police powers that are of general application. It confines itself to "repressive legislation" in other words "enactments that violate the most fundamental requirements of the rule of law." Nevertheless it makes up quite a collection. Ten major statutes are dealt with—and the pamphlet was written before news of the latest addition to the collection, the Bill setting up a Bureau of State Security (BOSS) which places matters of security beyond reach of the courts, the Press, or Parliament and *inter alia,* makes it an offence for anyone even innocently to disclose any matter with which BOSS is dealing if this is prejudicial to the interests of the State.

Reading this pamphlet is like visiting a museum of legal freaks and monsters. There is that vast Tyrannosaurus, the Suppression of Communism Act, which turns anyone into a Communist who is deemed one, which defines communism so widely that it includes campaigning for education, and which drags behind a weird tail of consequences—bans, confinements, listings, namings, and proscriptions. There is that sprawling family of General Law Amendment Acts, including the unpleasant little weirdie that enabled the Government to keep Sobukwe, the leader of the Pan African Congress, in prison for six years after the expiry of his sentence and then to banish him to live in the desert. Finally there are the real Uglies—The Sabotage Act and the Terrorism Act which abolish *habeas corpus,* allow for evidence gained under torture to be used, and create such a bewildering number of vague and generalised "crimes" which are proved by means of a whole series of presumptions against an accused, that they become in themselves symptomatic of the whole South African legal system. They provide a right to trial, but ensure that the accused is so trussed up and gagged that he has no hope of anything resembling a trial in our language.

All these Statutes, in the opinion of Mrs. Elizabeth Landis, who compiled the pamphlet, bring out certain general points.

> "There is the obvious attempt of the South African Government to disguise in internationally acceptable phrases its policy of outright suppression of all opponents of apartheid. This leads inevitably to vague and overly broad definition of terms, since the Government wants to achieve its objective without admitting its true nature. It also results in what can only be described as legal 'over-kill' Every possible offence is prohibited, not once but again and again in one after another statute. And every conceivable act is made illegal under some statute (the Terrorism Act being the ultimate example of this practice) so that no possible act or word of opposition will be exempt from retribution."

To get the full picture this pamphlet should be read in conjunction with Mr. A. Sax's *South Africa: The Violence of Apartheid* which makes the point that these laws not merely give effect to an existing social system but bring it about at the cost of untold cruelty to its victims. These two publications make it possible for the first time for those interested in the South African legal situation to view the laws as an interrelated whole.

HARRY BLOOM.

GENERAL PRINCIPLES OF LAW AND THE INTERNATIONAL LEGAL ORDER. By GÉZA HERCZEGH. [Budapest: Akadémiai Kiadó, Publishing House of the Hungarian Academy of Sciences. 1969. 126 and (index) 8 pp. £2 10s. net.]

THIS is a work for the serious scholar of international law, the jurisprudent and the collector of curios. The author's basic premise is that international law is made by the explicit or tacit will of states. "It has been upheld as a universal and regular feature that states are not limited in their activities except by obligations voluntarily undertaken by them" (p. 9). Thus he argues that "the general principles of law recognised by civilised nations" of article 38 (1) (c) of the Statute of the I.C.J. are concerned with the general principles of municipal law (this after an examination of the *travaux préparatoires* of the Statutes of the P.C.I.J. and I.C.J.); that the general principles of international law are inseparable from conventions and customary international law, and that therefore clauses (a) and (b) of article 38 (1) of the Court's Statute embrace those principles; and that the sources of international law, in a legal sense, denote the outward forms of legal rules and are therefore co-extensive with international conventions and custom. Clause (c) of article 38 (1) is thus excluded from being a source of international law, which is a distinct and independent system from municipal law, though the judges of the International Court may resort to clause (c) when filling so-called "gaps in the law" in determining disputes. Article 38 itself constitutes "the most important positive legal instrument in international judicature" (p. 8). Mr. Herczegh also touches upon other problems which bear upon the subject, such as sovereignty, the subjects of international law, international *jus cogens*, judgments by equity (*ex aequo et bono*), and the antagonism between positivist and natural law theories. In a deliberate attempt to acquaint the English reader with the "results achieved in the theory of law based on Marxism-Leninism," prominence is given to the writings of Hungarian international lawyers.

This bald summary does scant justice to the conception of the work, though perhaps the author has attempted to plough too broad a furrow.

Certainly many English-speaking international lawyers take a more flexible view of international law than is represented by Mr. Herczegh's rigid positivist approach. What is more important is that the basic conception of the book is presented dogmatically and summarily, in the same manner that natural law theories are dismissed. The work relies heavily on sketchy and arbitrary summaries of what other international lawyers, both socialist and "capitalist," have written, and these, though useful in enlightening the reader on socialist jurisprudence, are grossly misleading on occasion, *e.g.*, the discussion, on page 25, of Dr. Clive Parry's views on "the general principles of law recognised by civilised nations" contained in his Melland Schill lectures. The views of socialist writers are sometimes used as conclusive proofs in favour of a particular proposition (*e.g.*, pp. 49, 77). Not all English jurisprudents would agree with the view that "In the British approach to law . . . a legal norm is but a prophecy predicting the decision the judge is likely to come to" (p. 115). The naïveté of the style, the omission of words, punctuation marks, and references on occasion, the inclusion of sentences which simply do not make sense (*e.g.*, pp. 20, 25, 46), and the hopelessly inadequate system of case citation, detract from the real value of the work. Undoubtedly it has suffered much in translation.

Clifford Hall.

Book Notices

Anson's Law of Contract. 23rd Edition. Edited by A. G. Guest. [Clarendon Press: Oxford University Press. 1969. 655 pp. (inc. index). Hardback 75s. Paperback 38s.]

It is five years since the last edition of this work and the major changes have been a rewritten chapter on Misrepresentation as a result of the 1967 Act, and rewriting as a result of House of Lords decisions in *Suisse Atlantique*, *Esso Petroleum* v. *Harper*, *Beswick* v. *Beswick* and *Koufos* v. *Czarnikow*. There is also a short section on Codification of Contract (see Diamond (1968) 31 M.L.R. 361) although the editor does not envisage the enacting of the English and Scottish Law Commissions' proposed Code until at least 1975 to 1980.

Twelve Letters to an Articled Clerk. By E. A. Williams. [London: Law Notes Lending Library for The College of Law. 1969. 46 pp. 7s. 6d.]

These are twelve admirable short articles which appeared originally in *Law Notes* magazine. They are full of sound practical advice which is not found in ordinary legal textbooks. Students pass their examinations on their knowledge of the law; experience can only be acquired in time. This small pamphlet provides an excellent introduction to what makes up experience based upon thirty years of private practice.

Recommended Law Books. Edited by Richard Sloane. [American Bar Association: Committee on Business Law Libraries. Section of Corporation, Banking and Business Law. 1969. 307 pp. (no price available).]

This book selection guide is designed to provide American practising lawyers with an annotated list of the best and most useful available books in the various branches of the law. Practising lawyers have themselves made the selections. It is, of course, an American list and the selection of English works is sparse. Thus in contract we are offered *Chitty* (1961 edition), in torts, *Salmond* (1965 edition), and we learn that Goff and Jones on the *Law of Restitution* is the first comprehensive treatise on the subject in Anglo-American literature.

Misconduct in Employment. By B. R. Ghaiye. [Lucknow: Eastern Book Co. 1969. 1084 pp. (inc. index). Rs.40.00.]

An exhaustive and practical code on misconduct for the use of employers and employees in India. A comparable work by Avins was reviewed at (1969) 32 M.L.R. 710.

The Judicial Decision. By Richard A. Wasserstrom. [Stanford University Press: London: Oxford University Press. 1969. 197 pp. (inc. index). 24s. net.]

This is a paperback re-issue of a book first published in 1961 and reviewed in (1962) 25 M.L.R. 624.

The Law of International Institutions. Second Edition. By D. W. Bowett. [London: Stevens & Sons. 1970. 384 pp. (inc. index). Hardback £3 15s. Paperback £2.]

The first edition of this work was reviewed in (1964) 27 M.L.R. 490.

Books and Publications Received

The Export Trade. The Law and Practice of International Trade. Fifth Edition. By Clive M. Schmitthoff. [London: Stevens & Sons Ltd. 1969. 451 pp. (inc. index). £5 10s. net.]

Law and Practice of Building Contracts. Third Edition. By Donald Keating. [London: Sweet & Maxwell. 1969. 558 pp. (inc. index). £5 5s. net.]

Casebook on Sale of Goods. Second Edition. By E. R. Hardy Ivamy. [London: Butterworths. 1969. 220 pp. (inc. index). £1 10s.]

Crime on the Increase. Second Edition. By S. K. Ghosh. [Calcutta: Eastern Law House Private Ltd. 1969. 170 pp. (inc. index). £1.]

Co-ownership and Partition. Third Edition. By Shambhudas Mitra. [Calcutta: Eastern Law House Private Ltd. 1960. 304 pp. (inc. index). £1 10s.]

The Marine Insurance Act 1963. By A. K. Bhattacharjee. [Calcutta: Eastern Law House Private Ltd. 1969. 242 pp. (inc. index). £1 8s.]

The South African Law of Insurance. Second Edition. By Gerald Gordon assisted by W. S. Getz. [London: Sweet & Maxwell. Cape Town: Juta & Co. Ltd. 1969. 592 pp. (inc. index). R.25.00.]

Hockly's Students' Guide to the Insolvency Law of South Africa. Fourth Edition. By C. L. Rogers. [London: Sweet & Maxwell. Cape Town: Juta & Co. Ltd. 1969. 229 pp. (inc. index). £4 0s. 6d.]

Italian Abbreviations and Symbols. Law and Related Subjects. Compiled by Adolf Sprudzs. Foreign Law Librarian, The University of Chicago Law School. [Dobbs Ferry, New York: Oceana Publications Inc. 1969. 124 pp. $7.50.]

Constitutional Documents. With an Introduction by D. D. Basu. Vol. 1: British Constitutional Documents Relating to India. [Calcutta: S. C. Sarkar & Sons (Private) Ltd. 1969. 444 pp. £2.]

CORRESPONDENCE

THE EDITOR,
The Modern Law Review,

Dear Sir,

Are Collective Bargains Contracts?

There have been a number of cases in recent times where the court has had to choose between delving into the recesses of the parties' minds in order to discover an "intention" which never existed, or telling them something about themselves which they never knew.[1] One wonders what is the purpose of this exercise. In *Gould* v. *Gould*[2] Lord Denning stated that the intention of the parties "is to be found by looking at what the parties said and did in the situation in which they found themselves, and then asking: What would reasonable people think about the provision? Would they regard it as intended to be binding?" This appears to be Mr. Clark's position, and must be criticised as being too vague and potentially capricious. The answer to Lord Denning's question is that frequently reasonable people may well differ. Some may answer yea, others, nay. In *Gould* v. *Gould* itself, the county court judge and Lord Denning arrived at the same conclusion; two other (eminently reasonable!) members of the Court of Appeal reached the opposite result! A similar divergence of judicial opinion exists in *Jones* v. *Padavatton*.[3] This exercise in counting the heads of reasonable people is about as scientific as tossing a coin, and is clearly unsatisfactory. The spectacle of a hypothetical person seeking a non-existent intention is surely one which deserves to be exorcised from our law.

The real truth about the concept of "intention to create legal relations" is that it is constantly being used as a mumbo-jumbo formula to enable one party to avoid the legal consequences of a breach of an agreement. If we must retain the notion, it should be kept within clearly defined limits, lest commercial chaos results. In particular, if trade unions wish to buy legal abstention, this should be achieved by use of the honourable pledge clause,[4] rather than relying on legal fictions which have outlived whatever usefulness they ever had.

Mr. Clark seeks the distinction between "an agreement not intended to be legally binding" and "a contract which is not intended to be enforced at law." This is really quite simple. If I sell my house to my sister, a binding contract exists; nonetheless, the likelihood of my enforcing it in a court of law is remote. Should she decide to break the agreement, I am quite likely to seek a social sanction (*e.g.*, complain to my mother!) rather than look to a legal remedy. But the contract remains a valid one. This is how the collective bargaining system in this country works. The parties in general rely on their own built-in sanctions and procedures, rather than legal remedies. But this does not mean that the latter are necessarily excluded. I have in my possession the minutes of a joint standing committee of an employers' association and a trade union.[5] At the meeting, there was a dispute about the meaning of a certain provision in the collective agreement, and the union representative was rather annoyed with the employers' version. I quote from the statement of the union official: "Let me make it clear that so far as I am concerned I have never had any doubt about what the legal position would be. There would be a very good case to take to court. But that is not the issue. That is not the way we deal with things." Is not this union official saying that this is a contract, but that the parties will seek other methods of solving the dispute?[6]

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[1] 1969 alone saw *Jones* v. *Padavatton* [1969] 2 All E.R. 616; *Merritt* v. *Merritt*, *The Times*, May 15, 1969; *Ford Motor Co.* v. *A.E.F.* [1969] 2 Q.B. 303; *Gould* v. *Gould* [1969] 3 All E.R. 728; *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966.

[2] [1969] 3 All E.R. 728, 730.

[3] [1969] 2 All E.R. 616.

[4] *Rose and Frank Co.* v. *Crompton & Bros. Ltd.* [1925] A.C. 445. I have seen one example of this in recent times, and doubtless there are others.

[5] The document was handed to me in confidence, so the parties must remain nameless for the moment.

I cannot accept that the Canadian cases are such that they give any weight to Geoffrey Lane J.'s interpretation of *Young's* case, nor Mr. Clark's casual dismissal of the Irish decisions. It is true that there are a number of Canadian authorities where an action to enforce a collective agreement failed. But in no case was it decided that the parties did not intend to create legal relations. The grounds for such failure include (a) the union was unlawful at common law,[7] (b) the union lacked legal personality,[8] (c) there was no mutuality,[9] and (d) the agreement was normative in effect, not contractual.[10] On the other hand, when these defences were not raised, or were overcome, actions have succeeded. Thus in *Hollywood Theatres* v. *Tenney*,[11] a company succeeded in obtaining an injunction restraining a strike in breach of an agreement, as well as damages for the loss it had suffered.

Modern Irish cases are more conclusive and consistent.[12] I would not pretend to be able to weigh their value as persuasive precedents, but at least they deserve examination. There may be "good reasons for not following them in this country," though what those reasons are, and how good they are, I would not know. One suspects that the House of Lords does not always get the message.[13]

It may be that the overwhelming weight of opinion thought that collective agreements were unenforceable, though I rather doubt whether this is a relevant or significant fact. Whether "the overwhelming weight of *legal* opinion" agreed with this, I doubt even more. Professor Wedderburn has stated[14] that the question has been canvassed in the Temple on at least six occasions, and each time counsel has advanced the view that the agreements were legally binding. In any case, whatever may have been the former position, the persistent demand from employers and their federations (and political supporters) currently indicates an equally overwhelming intention to create legally binding contracts.

The real weakness in Mr. Clark's argument is that he fails to explain why collective agreements should constitute an exception to the doctrine of *pacta sunt servanda*. What is there so peculiar about them that apologists resort to strange devices in order to exclude them from the ambit of the law?

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[6] The matter was referred to an experienced arbitrator, who, in an opinion studded with legal authorities, found in favour of the union.

[7] *Polakoff* v. *Winter Garment Co.* (1928) 62 O.L.R. 40. *Contra*, *Starr* v. *Chase* (1924) 4 D.L.R. 55.

[8] *Robinson* v. *Adams* (1925) 1 D.L.R. 359; 56 O.L.R. 217; *contra*, *Krug Furniture Co. of Berlin* v. *Berlin Union no. 112, Amalgamated Woodworkers, International Union of America* (1903) 5 O.L.R. 463.

[9] *Young* v. *Canadian Northern Railway* (1929) 4 D.L.R. 452; (1930) 3 D.L.R. 352, (1931) 1 D.L.R. 645.

[10] *Betrand* v. *Canadian National Telegraph Co.* (1947) 1 W.W.R. 762; (1948) 1 D.L.R. 209.

[11] (1940) 1 D.L.R. 452. See also *Ziger et al.* v. *Shiffer & Hillman Co. Ltd.* (1932) 41 O.W.N. 392, (1933) 2 D.L.R. 691; *Wright et al.* v. *Calgary Herald* (1938) 1 D.L.R. 111; *Corbett et al.* v. *Canadian National Trade Union et al.* (1942) 2 D.L.R. 762; (1943) 4 D.L.R. 441.

[12] *McMahon & Lynch* v. *Minister of Finance*, May 13, 1963; *T.S.S.A.* v. *C.I.E.* 100 I.L.T.R. 189 (Sup.Ct.) 1961; *Hynes* v. *Conlon* (1939) 5 Ir.Jur.Rep. 49; *O'Callaghan & O'Cinneide* v. *Minister for Education*, November 30, 1955. I too am grateful to Mr. McCartney for drawing my attention to these decisions.

[13] See *Rookes* v. *Barnard* [1964] A.C. 1129.

[14] Address to the Irish Society for Labour Law and Social Legislation, May 11, 1968.

It is true that they are not ordinary contracts, but then, no contract is "ordinary," and arguments against legal enforcement can be applied equally to other types of contractual relationships. An American authority has pointed out[15] that "The term 'contract' describes a family of relationships, but within that family there are many genuses, and the collective agreement is one genus in that family." If collective bargaining raises new problems, the answers must be sought in new legal concepts and ideas, not in legal abstentionism. As Scrutton L.J. said, "There must be no Alsatia in England where the King's writ does not seek to run."[16]

Instead of providing these answers, Mr. Clark calls in aid Aitkin L.J. in *Balfour* v. *Balfour*: "The consideration for [these agreements] is that natural love and affection which counts for so little in these cold courts." If this is a description of modern collective bargaining, I suppose we must be grateful to Mr. Clark for introducing a note of hilarity into this discussion!

NORMAN SELWYN.

University of Aston in Birmingham.

THE EDITOR,

The Modern Law Review.

Dear Sir,

"In 1967 the assignee of the freehold reversion of a field bordered on the west by a river and on the south-east by a canal, granted to the defendant an easement of a right of way along a footpath leading from a main road to a plantation of trees adjacent to the field. In 1968 the plaintiff canal company, which owned land bordered by the canal to the south and a railway siding to the north . . ."

How often, when reading a headnote of a law report, have we had to try to disentangle this sort of description? We end up, perhaps, by attempting to draw a sketch plan. But we can seldom be certain that we have got the plan right, and that we really understand which piece of land lay where. How much simpler it would be in this kind of case if the report contained a small, rough, sketch map. One glance at the map would save much time and frustration.

It is for this reason that the inclusion of a map in the *Weekly Law Reports* report of *National Dock Labour Board* v. *John Bland* [1969] 3 W.L.R. 1068 is to be warmly welcomed. It would be of great assistance if this practice was followed in future as a matter of course in all cases where a number of pieces of land were involved. If a plan can form part of a deed, why should not a map form part of a law report?

J. G. RIDDALL.

The University,
Leeds.

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[15] Summers, "Collective Agreements and the Law of Contracts," (1969) 78 Yale L.J.

[16] *Czarnikow* v. *Roth, Schmidt & Co.* [1922] 2 K.B. 478. "The concept that an organised group may enforce upon others its interpretation of the law or of its contractual obligations by economic or physical force without appeal to the Courts of the land to determine the legal rights involved is of itself a determined attempt to ignore the 'rule of Law' and as such is fundamentally inconsistent with our system of law. Any attempt to place labour or business controversies outside of organised society and refuse to subject them to social controls is repugnant equally to our common law and our statute law. Industrial and business relations and the activities of both labour and capital must be regulated according to legal principles if chaos is to be averted." *Per* O'Halloran J.A. in *Hollywood Theatres* v. *Tenney* (*supra*).

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TRADE UNIONS, THE LAW AND SOCIETY*

I

A LIVELY discussion has been conducted over the last few years on the impact of the law on labour relations. This discussion has suffered from over-generalisation. Certain aspects of labour relations cannot be controlled by the law. The law is likely to be a failure whenever it seeks to counteract habits of action or of inaction adopted by large numbers of men and women in pursuance of established social custom, norms of conduct or ethical or religious convictions. Policies to control spontaneous strike movements by threats of penalties or civil liabilities are doomed to failure, and what has happened in Western Germany and in Sweden since the publication of the Report of the Donovan Commission has lent further support to the attitude adopted by its majority.[1] There was little reason for the excitement caused in trade union quarters by the so-called " penal " clauses in the White Paper *In Place of Strife.*[2] These clauses would have been unenforceable in practice. In a country in which statutes are deliberately couched in an esoteric language invented by lawyers for the use of lawyers it is difficult to rely on the educative role of legislation. Most legislation operates not by the lesson it teaches or the sermon it preaches but by the promise of rewards or the threat of deprivations attached to its observance or breach, that is, by the expectation of its enforcement. Legal norms have their social effect through legal sanctions, and sanctions cannot be applied to counteract the spontaneous conduct of amorphous masses.

They can, however, be applied to regulate the conduct of organisations. The scope of the law grows as organisation in society supplants spontaneity. This is a sociological commonplace, but it is worth remembering when discussing the role of law in labour relations. In the area of the behaviour of trade unions to their members or potential members the law can play a role. I am concerned to show that it should do so.

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* This is—with slight variations—the Gaitskell Memorial Lecture of 1970, delivered at the University of Nottingham on January 23, 1970. The Lecture was mainly intended for non-lawyers.

[1] Report of the Royal Commission on Trade Unions and Employers' Associations, Cmnd. 3623 (1968), Chap. 8.

[2] Cmnd. 3888 (1969), paras. 93 *et seq.*

What I consider the need for legislation—let me emphasise it at the outset—does not arise from widespread abuses of trade union power.

The situation in this country today is not comparable to that in the United States revealed in the 1950s by the investigations of the McClellan Committee of the Senate[3] which led to the passing of the Landrum-Griffin Act of 1959.[4] Nor is it comparable even to the state of affairs in this country a century ago when the first of all the Royal Commissions on Trade Unions, the Erle Commission, which reported in 1869,[5] recommended those measures of financial control which eventually found their way into the Trade Union Act of 1871.

The inquiries initiated by the Donovan Commission[6] showed that complaints about arbitrary expulsions, faked elections, financial malpractices, etc., are very rare indeed. By and large, the trade union movement in this country came out of all these inquiries with a very good record. Once more (as so often) those of us who are lawyers were taught the elementary lesson that the law reports are the worst possible mirror of society. They convey to the beholder a distorted image in which that which is marginal appears as typical, and this may be one of the reasons why sometimes the judgments of lawyers on problems of social policy are so surprisingly warped and ill-founded.

Misuse of trade union power is a rare phenomenon in this country, but it can occur and it does. The law, however, is concerned with the marginal cases. This is where empirical social scientists and lawyers so often fail to understand each other. The lawyer looks at the marginal case, and the empirical social scientist treats with contempt proposals to deal with anything which according to the statistics happens only rarely. "But how often does this happen?" "But suppose it does happen!"—how often have I heard this dialogue and taken part in it. It is the possibility of a misuse of union power that is on my mind far more than its actuality—though, as I shall have to mention, actual cases are not missing. Most employers are conscientious in the treatment of employees with long employment records. This is no answer to a demand for legislation on unfair dismissals. Unions do not normally abuse their power to refuse admission or to expel members. This is no answer to a plea for legislation on this matter either.

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[3] On the McClellan Committee, see Clyde W. Summers, "American Legislation for Union Democracy" (1962) 25 M.L.R. 273. Its full title was: Select Committee on Improper Activities in the Labor and Management Field, and it made three Reports: 85th Congr., 2nd Sess. No. 1264; 86th Congr. 1st Sess., No. 621; 86th Congr. 2nd Sess., No. 1139.

[4] Labor-Management (Reporting and Disclosure) Act 1959.

[5] Eleventh and Final Report of the Royal Commission appointed to inquire into the Organisation and Rules of Trades Unions and Other Organisations, H.M.S.O. 1869.

[6] See Workplace Industrial Relations. An Inquiry undertaken for the Royal Commission on Trade Unions and Employers' Associations, 1966, published March 1968, esp. pp. 128 *et seq.*; Nos. 6.54–6.62. See Cmnd. 3623, para. 619.

In a sense the position of the trade unions in society today is paradoxical. They are private, voluntary and autonomous organisations, but they discharge indispensable public functions. Some of these have been conferred upon them by legislation or administrative practice, through membership in innumerable governmental institutions, committees, tribunals, and through rights of consultation throughout the legal system. But some public functions have been assumed by them through their own practice. As McCarthy has shown in his book on the closed shop,[7] about two-fifths of all members of unions and about one-sixth of the total labour force work in a " closed shop " of some sort; that is, in order to have access to the labour market, they must be or become members of a union or of a particular union. In controlling access to membership the union participates in the control of the labour market—a public function. Seen from the angle of the individual, the willingness of an employer to employ him, and the willingness of the union to admit him are both conditions for obtaining a job, and he may lose it by being dismissed by the employer or expelled by the union. There is a strong case for legislation against arbitrary dismissals, and also perhaps against arbitrary or at least against discriminatory refusals to employ—that this is possible has been shown by the Race Relations Act 1968.[8] The case for legislation to prevent arbitrary refusals to admit to, and arbitrary expulsions from, trade unions is almost equally strong. A measure of legal control is needed to check the misuse of managerial powers as well as the misuse of organisational autonomy. Resistance to social legislation on the pretext of freedom of property or of management rights has the musty smell of the mid-nineteenth century. So has the resistance to the legal protection of the individual against the abuse of organisational power on the pretext of unfettered autonomy.

The control of some unions over access to some sections of the labour market has for many years lent a measure of practical importance and also a strong emotional flavour to these problems. The closed shop is morally incompatible with the closed union. If membership in a union is a condition for getting or holding a job, then it must not be arbitrarily withheld or withdrawn. This is the principle on which the law has, in very different ways, acted both in the United States and in Australia. Nor is it compatible with the public functions exercised by trade unions and employers' associations that they should exclude anyone arbitrarily from participation in the exercise of the union's or association's decision-making power. Arbitrary exclusion or expulsion from membership should not be tolerated even where it does not bar access to a job. Is it not generally true that the unions represent the interests of all the workers? And is union membership not often a condition for a reasonable social existence even where there is no closed shop? And if all this is true, does not the argument for a measure of legislation on the right *to* membership also apply to the rights arising *from* membership, and especially to the right to participate in elections and decisions, which has nothing to do with the closed shop? The matters I am discussing here may be especially important where there are "closed" shop arrangements of some sort, but the scope of those arrangements is not co-extensive with the area in which these problems are relevant. That area is very much wider.

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[7] *The Closed Shop in Britain*, 1964, p. 28. See Cmnd. 3623, paras. 588 *et seq.*

[8] s. 3.

With these general considerations in mind, let me now examine the problem of the right to membership, and then—more briefly—the right to enjoy some of the rights which arise from it.[9]

II

First as to the right to membership. Obviously I have to speak first about admission and then about the termination of membership.

(a) Admission to membership of a voluntary body has traditionally been considered as a territory forbidden to the law. This is, and has until recently, been the attitude of legislation and of the courts.[10]

It is true that since 1913 there has been a remote corner in which the law has regulated admission to union membership. According to the Trade Union Act 1913,[11] the political fund rules of a union must provide that " contribution to the political fund shall not be made a condition for admission to the union," but this is a knife without an edge because a violation of the rule could not be complained of by the frustrated applicant, and thus there is no effective sanction for its observance.[12] Moreover, it does not protect anyone rejected because of his political opinions or activities, but only a person excluded because of his unwillingness to contribute to the political fund—a very different matter. I have never heard of any abuses in this area [13] and I mention this only to show that, even more than half a century ago, Parliament did not regard union admission as a sacred cow which legislation could not touch.

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[9] For a valuable discussion, see Rideout, *The Right to Membership of a Trade Union*, 1963. For reasons which will appear in the text Dr. Rideout's penetrating analysis has now to some extent been overtaken by recent developments, some of which are discussed in his article "Admission to Non-Statutory Associations Controlling Employment," (1967) 30 M.L.R. 389.

[10] Until recently the unsatisfactory decision in *Weinberger* v. *Inglis* [1919] A.C. 606 was considered as the last word. The policy of the courts not to intervene in the internal affairs of voluntary bodies was established by Jessel M.R. and the Court of Appeal in the leading case of *Dawkins* v. *Antrobus* (1879) 41 L.T. 490; (1881) 17 Ch.D. 615, and applied to trade unions by Jessel M.R. in *Rigby* v. *Connol* (1880) 14 Ch.D. 482. Except as regards admissions this policy underwent a profound change in its application to the unions, and, whilst *Dawkins* v. *Antrobus* has remained part of the law, *Rigby* v. *Connol* was at least implicitly overruled by the House of Lords in *Amalgamated Society of Carpenters and Joiners* v. *Braithwaite* [1922] 2 A.C. 440.

[11] s. 3 (1) (*b*).

Much more recently however, two things have happened which may put a new complexion on this matter. One was the decision of the Court of Appeal in *Nagle* v. *Fielden*.[14] The other was the enactment of section 4 of the Race Relations Act 1968.

Nagle v. *Fielden* comes from a sphere of life very far away from industry and trade unions. The refusal of the Stewards of the Jockey Club to license a woman as a trainer of race horses made it impossible for a woman to enter for a race a horse trained by herself. This private organisation, the Jockey Club, wielded an unfettered, uncontrolled and monopolistic power to grant or withhold access to a type of economic activity. It is a power very much like that of a public authority entrusted by Parliament with granting licences, such as the Traffic Commissioners' power to grant licences for the running of bus or coach services. The arbitrary exercise of such a power is subject to the strict principles of administrative law, precluding decisions based on irrelevant considerations. Should the same not be true of a private body having similar power? The Court of Appeal said it should, but to be able to do so it had to strike a bold path through the jungle of common law. The plaintiff, a lady who did train horses, was held to have no contract with the Stewards of the Jockey Club,[15] and where was the tort? [16] And yet, said the court, her case could not be rejected out of hand. It was against public policy to refuse a licence to an applicant merely because she was a woman, and the Stewards could, on this ground, be restrained from following this practice and be ordered to grant the plaintiff a licence. This was expressly based on her "right to work," and on the duty of the courts to check the capricious exercise of a monopolistic power to control access to an activity. Trade unions were repeatedly mentioned in this context, yet the principles laid down by the Court of Appeal cover only a small corner of the field. To apply them to a union one would have to show that it is as strictly monopolistic as the Jockey Club, *i.e.* that it controls an industry or at least employment in a particular kind of job "in which it can effectively prevent anyone from earning a living."[17] However, McCarthy has shown[18] and the investigations of the Donovan Commission[19] have confirmed that rigid formal pre- or post-entry shop arrangements exist only in a fairly small sector of industry. The *Jockey Club* case does not solve our problem, but it establishes an important principle all the same.

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[12] If the clause is not in the rules, and—which is most unlikely to happen—they are nevertheless approved by the Registrar, there are no valid rules, there is no political fund, and the union cannot spend any money for political purposes. See *Birch* v. *N.U.R.* [1950] Ch. 602. If the rule is violated, a member can complain to the Registrar (s. 3 (2)), but the frustrated applicant cannot. See *Citrine's Trade Union Law* (3rd ed.), p. 431.

[13] For the reasons stated in *Citrine*, *loc. cit.*, p. 427, note 14, breaches of the rule are in fact most unlikely.

[14] [1966] 2 Q.B. 633 (C.A.). See Notes by Rideout (1966) 29 M.L.R. 424, and by A. L. G. (1966) 82 L.Q.R. 319.

[15] This is clearly a correct decision, and *Byrne* v. *Kinematographic Renters Society* [1958] 1 W.L.R. 762 is a very debatable case. Nor does English law know a notion of *culpa in contrahendo* or (exceptions such as that of the common carrier or the innkeeper apart) *culpa in non contrahendo*, to say nothing of *abus de droit*.

[16] Conspiracy can be ruled out in view of *Crofter Harris Tweed Co.* v. *Veitch* [1942] A.C. 435.

The other relevant recent event was, as I have said, the enactment of section 4 of the Race Relations Act 1968. This makes it unlawful for a trade union or an employers' association or any other organisation "concerned with the carrying on of trades, businesses, professions or occupations" to discriminate against any applicant for admission on the grounds of colour, race or ethnic or national origins. The unlawful discrimination may consist in a refusal to admit him altogether or in deliberately admitting him on terms unlike those of other applicants. This is, of course, only one of a set of provisions dealing with various forms of racial discrimination in employment, housing and the supply of goods, services and facilities.[20] It is, from a practical point of view, far less important than the rules on housing[21] and on employment,[22] but seen in the light of the development of the law, it is one of the boldest provisions of the Act. It is not only unlawful to treat, say, a West Indian or Pakistani applicant less favourably than a white applicant by refusing him admission, but also by granting him admission on less favourable terms, and in this connection it is noteworthy that the Act declares segregation to be discrimination.[23] "Separate but equal" has no place in English law. Since the trade unions are officially opposed to racial discrimination of any kind, the problem of "national origin" may in practice be even more important. It means that it is unlawful for a union to discriminate against foreign workers by reason of their nationality. It is one of the obligations undertaken by the United Kingdom through the ratification of the European Social Charter[24] to apply the Race Relations Act so as to secure for workers who are nationals of one of the other parties to the Charter treatment not less favourable than that of citizens of the United Kingdom, and this especially in respect of "membership of trade unions and enjoyment of the benefits of collective bargaining."[25] In matters of admission to unions or enjoyment of the benefits of collective bargaining, including *e.g.* bargaining about dismissals in the event of redundancy, it is an international obligation of the Government to ensure that, say, an Italian is treated no worse than a British subject, provided he is lawfully in the country.

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[17] Salmond L.J. [1966] 2 Q.B. at p. 654.

[18] See above, note 7.

[19] *Loc. cit.*, para. 588 *et seq.*

[20] ss. 2–5.

[21] s. 5.

[22] s. 3.

[23] s. 1 (2).

[24] Dated October 18, 1961, ratified by the United Kingdom on July 11, 1962, and in force since February 26, 1965.

The policy against discriminatory admission practices will be strongly reinforced by Article 48 of the Treaty of Rome[26] as soon as the United Kingdom has entered the European Economic Community. The tide which, however feebly, is running in the direction of free movement will not be held back by the sacrosanctity either of "managerial prerogatives" or of "organisational autonomies." The principle of bilateral autonomy is, however, reflected in the enforcement provisions of the Race Relations Act.[27] Each case of alleged discrimination in employment or admission to membership must, if this is possible, be referred to a "body of persons suitable to consider that complaint," *i.e.* to a joint industrial council or similar voluntary bilateral body. This makes the enforcement of the substantive principles very complicated. It may also make it more effective.

The principle of *Nagle* v. *Fielden* presupposes strict control of access to the labour market, that of the Race Relations Act presupposes national, racial or ethnical discrimination. Other areas of possible discrimination, *e.g.* personal spite or animosity, are not affected by any existing legal principle. Nor are cases in which the arbitrariness of the practice is to be found in the existence of a rule establishing irrelevant criteria of admission. The latter type of case is, in the minds of lawyers, associated with the name of the unfortunate Mr. Faramus who fell foul of a rule of the Film Artistes Association,[28] a closed shop union, barring from membership "any person who has been convicted in a court of law of a criminal offence other than a motoring offence not punishable by imprisonment." He answered the question about convictions in his membership application with "no" although many years previously he had committed some insignificant and irrelevant offences. For eight years he pretended to be and was treated as a member, and then the mistake was discovered. The House of Lords held that he had never become a member, and as the law stands, the decision may have been right. The Film Artistes Association had a good case for protecting its members against theft of their belongings in dressing rooms, etc., but the rule went much further. Under it a man's application could be rejected because he had been fined for riding a bicycle without a lamp or for having failed to pay his television licence, and, as I have said, the union operated a closed shop. As Lord Denning said in his dissenting judgment in the Court of Appeal,[19] he may be " debarred from entering a trade by reason of a conviction as irrelevant to membership as the colour of his hair " or, we may add, " of his skin." A rule as general as this lends itself with the greatest ease to hidden discrimination. By this I mean the form of discrimination which consists in turning a blind eye to violations in ninety-nine cases and enforcing it in the hundredth for reasons which have nothing to do with the rule itself. We are all familiar with the story of the active or militant trade unionist whom his employers dismiss for smoking in a forbidden place, which innumerable others had done with impunity. This is a misuse of power, but the person who acts that way and is then taxed with discrimination usually adopts an attitude of righteous indignation and points to the rule, and to prove the discriminatory motivation will normally be beyond the wit of man. We have no evidence that in the *Faramus* case the attitude of the union was prompted by irrelevant motives such as personal enmities or differences on union policies, but if it had been, the courts could have done no more about it than they can do for a trade unionist dismissed by his employer allegedly for a trifling breach of discipline. English law has no general principle of " abuse of right."

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[25] Art. 19, para. 4 (*b*). This obligation exists only "in so far as such matters are regulated by law or regulations or are subject to the control of administrative authorities," but this is what has happened with the enactment of the Race Relations Act 1968.

[26] By Art. 48 "the free movement of workers shall be secured within the Community. . . ." This "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other working conditions."

[27] ss. 16, 17 (1) (*b*) and (2) (*i*), Scheds. 2 and 3, Pt. II.

[28] *Faramus* v. *Film Artistes Association* [1964] A.C. 925. Notes in (1963) 26 M.L.R. 436; (1963) 79 L.Q.R. 186.

A refusal to admit—and also a decision to expel—can thus be arbitrary, capricious or discriminatory either because a rule under which action is taken is itself arbitrary, capricious or discriminatory or because a rule which is unobjectionable is applied in an objectionable manner—the *Jockey Club* case shows an example of the first, the *Faramus* case an example of the second situation—there the rule was objectionable only in the sense of being too general and conducive to discriminatory practice. What all this shows, however, is that any legislation seeking to counteract discrimination must be concerned with the rule-making or legislative as well as with the rule applying or administrative practice of voluntary bodies, just as any legislation against unfair dismissals must be directed against unfair disciplinary rules made by the employer as well as against his way of applying unobjectionable rules. In the *Jockey Club* case a unanimous Court of Appeal declared the openly discriminatory rule of the Jockey Club to be against public policy. In the *Faramus* case, however, the majority of the Court of Appeal and a unanimous House of Lords rejected Lord Denning's dissenting view that the same should be said about the rule of the Film Artistes' Association. One can explain this by saying that it was not the Film Artistes' rule itself which was objectionable, but its potential application, but the fact is that, in rejecting Lord Denning's view, some of the judges committed themselves *obiter* to the view that unreasonable prohibitions of entry were never subject to the scrutiny of the courts, not even if they were openly discriminatory.[30] This shows that the legal situation is far from clear and that legislation is required.

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[19] [1963] 2 Q.B. 527, 539.

Such legislation would seek to give redress to applicants for union membership against a rejection which is, I repeat the words, arbitrary, capricious or discriminatory. It is easy to spell this out, and it is very difficult to say what it is to mean in practice. The chief difficulty is deeply rooted in the structure of British society and its traditions. For better or for worse many unions have inherited the medieval guild tradition of the " control of the job," and this includes the use of the control of union entry as a means for regulating supply in the labour market. This is one of the facts of life with which one has to reckon—it is a fact of social life far beyond the operations of the trade unions, for the whole of British society is riddled with market-regulating practices operated by occupational and professional bodies—the Inns of Court are a good example. More important, this is one of the accepted traditional precautions adopted to alleviate the omnipresent fear of unemployment.

Hence a refusal to admit prompted by a genuine desire to regulate the labour market cannot be called " arbitrary " in the sense in which it is arbitrary to exclude a man because of the colour of his skin, because of his religious beliefs, or by reason of a personal quarrel with the branch secretary. There may be borderline cases, such as the refusal of craft unions to admit apprentices above a certain age (age discrimination) and, above all, the refusal to admit women. Sex discrimination in union practices may become a major problem very soon, and " equal access to jobs " may turn out to be a more fundamental and certainly a more difficult problem than " equal pay for equal work " or even than " equal pay for work of equal value."

These are great difficulties, and altogether the entire problem of legislation against arbitrary refusal to admit bristles with complexities, largely but not entirely of a technical nature.

It is therefore instructive to see what has happened abroad. The problem is of importance, not only in this country, but also for example in the United States and in Australia, but very much less so in Continental countries such as France or Germany. In many Continental countries the closed shop is illegal but the law seeks to ensure that unorganised workers cannot undercut union members in the labour market. This may be one reason why the problem of arbitrary refusals to admit has not been discussed very much on the Continent. There are indications—a number of isolated decisions—that in extreme cases a refusal to admit at any rate to an employers' association may involve those responsible in delictual liability both in France and in Germany, but these are isolated cases, and on principle both legal systems insist very strictly on the autonomy of the organisations in admitting or refusing to admit.[31]

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[30] *e.g.* Lord Pearce [1964] A.C. at p. 947; Diplock L.J. [1963] 2 Q.B. at pp. 555 *et seq.*

The Australian legislature has not had any scruples of this kind. Australia has a far-reaching set of provisions designed to prevent arbitrary refusal to admit applicants to union membership and arbitrary expulsions. These provisions must be seen as part and parcel of the Australian system of compulsory arbitration. To participate in compulsory arbitration proceedings[32] and to be able to conclude industrial agreements[33] an Australian trade union or "association" must, under the Commonwealth Conciliation and Arbitration Act, be registered as an "organisation."[34] To be registered as an organisation is therefore for a trade union a *sine qua non* for the effective discharge of its functions. The registration is subject to a large number of conditions, some of which concern the relationship between the union and its members or potential members. One of the most important of these is the provision[35] which lays down that "a person employed in connection with an industry" is entitled to be admitted as a member of an organisation, and to remain a member so long as he complies with its rules. This is subject to the condition that he pays the amount properly payable in respect of membership. The union can, however, refuse admission if it proves that the applicant is "of general bad character" or a member of certain unlawful organisations, and further, the Commonwealth Industrial Court can, on the application of an organisation, terminate the membership.[36] All this is mandatory law which cannot be abrogated by the rules of the organisation. In the event of a dispute on admission or expulsion the applicant or the member or the organisation itself can ask the Commonwealth Industrial Court for a declaration as to the entitlement to membership or continued membership, and the court may make an order by the force of which the person concerned becomes or remains a member.[37] The Australian law thus goes considerably further than merely to prevent arbitrary or capricious or discriminatory refusals to admit—though no doubt this is its principal purpose—and it places on the union the burden of showing that it had a specific and legally recognised cause for refusing admission. The court has held that " admission " means admission to effective membership.[38]

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[31] For Germany: B.G.H.Z. 25.5.56, Vol. 21, 1; for France: Cass. Civ. 27.10.1924; D.P. 1926.1.104. See Durand-Vitu, *Traité de Droit du Travail*, Vol. 3, Para 70, p. 215 note (1); Brun Galland, *Droit du Travail* III 19, p. 658; Nikisch, *Arbeitsrecht*, 2nd ed., Vol II, p. 64; Spyropoulos, *La Liberté Syndicale*, p.158. If the refusal to admit constitutes "une manoeuvre dolosive, concertée dans le but de lui nuire et inspirée par des motifs étrangers à la défence des intérêts professionnels," the applicant is said possibly to have a delictual action under Art. 1382 of the French Civil Code and perhaps in similar circumstances he might have an action under Para. 826 of the German Civil Code. This may in extreme circumstances be a case of conspiracy at common law. See, however, Verdier, *Syndicats*, in Camerlynck, *Traité de Droit du Travail*, Vol. 5, pp. 222–223, who suggests that this would also apply to cases of political or religious discrimination.

[32] Commonwealth Conciliation and Arbitration Act, 1904–1968, s. 68.

[33] *Ibid.*, s. 172.

[34] *Ibid.*, s. 132.

[35] *Ibid.*, s. 144.

All this was possible in Australia because of the far-reaching legal regulation of the collective bargaining system and because of the almost equally far-reaching potentialities of legal trade union regulation which this involves. If the functioning of the collective bargaining system depends on the operation of the law, and if the functioning of the unions depends on participation in the legally regulated bargaining system, then unions become themselves subject to legal regulation to an extent which in other countries would be considered as intolerable. It is for this reason that Australia can teach only a very limited lesson to the British legislature.

Not only does Australian law go far beyond a mere prohibition of discrimination, it also applies to all unions, irrespective of whether or not they operate a closed shop of any kind. In effect it deprives the unions of the power of regulating supply in the labour market through a restrictive admissions policy. The " open union " is enforced whether the shop is open or closed.[39]

In all these respects the system adopted in the United States is radically different. It is as different from the Australian system as it is from that of the United Kingdom.

On principle American labour unions are as free to admit or to refuse admission as are their British counterparts, but there are, under the Federal law (I am not dealing with state legislation), two very important exceptions to this. One concerns what the Americans call the " union shop " (which is more or less what we call the post entry closed shop) and the other is about discrimination—which, let it be noted, includes under the Federal

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[36] *Ibid.*, s. 150.

[37] *Ibid.*, s. 144 (5)–(7).

[38] For case law see Nolan & Cohen, ***Federal Industrial Law***, 3rd ed. by Mills, p. 374.

[39] It is, however, interesting that the right to apply to the court under the provision mentioned in note 37 is not only given to the organisation and to the person whose entitlement is in question, but also to " a person who is or desires to become the employer of that person,"—which shows how much the " closed shop " has in fact to do with the whole problem.

Civil Rights Act of 1964[40] discrimination not only by reason of colour, race or national origin, but also by reason of religion and by reason of sex.

To understand the provisions about the union shop, one must realise that the pre-entry closed shop is forbidden under the Federal law[41] and that the post-entry closed shop or "union shop" is permitted only under certain restrictive conditions. The "union shop" as applied to any given undertaking means that, by an agreement between the employer and the union, membership therein is a condition of employment after the thirtieth day of its beginning or such later day as is fixed by the agreement.[42] The law affecting admission and expulsion relates to workers who come within such an agreement. They have no right to membership—the union is still free to reject them, but if an employer has reasonable grounds for believing that membership was not available to the employee and available on the same terms and conditions as generally applied to other members, then he must not discriminate against him by reason of his non-membership.[43] In other words, the law says to the union: you remain free to admit or reject at your discretion, but if your rejection is discriminatory, then you cannot invoke your union security agreement against the person rejected: in so far as you operate a closed union, you cannot operate a closed shop. It is an unfair labour practice for the employer to discriminate against a person thus rejected[44]; it is an unfair labour practice for the union or its agents to cause or attempt to cause an employer to do so,[45] and—here is the only restriction on freedom of admission itself in this context—it is also an unfair labour practice for a union to exact from a worker coming within a union shop agreement an initiation fee which is excessive or discriminatory.[46] Unfair labour practices can be checked in elaborate proceedings before the National Labor Relations Board whose orders may ultimately be enforced by court injunctions and the penalties of contempt of court.[47]

Here then, the law seeks indirectly to control admission practice. The anti-discrimination provisions of the Civil Rights Act 1964, Title VII (which largely influenced the employment and union membership provisions in our Race Relations Act 1968, ss. 3 and 4), operate directly. For a labour organisation it is an "unfair employment practice" to "exclude or expel from its membership or otherwise to discriminate against any individual because of his race, colour, religion, sex or national origin." [48] It is also an "unfair employment practice" for a union to "limit, segregate or classify its membership" for these reasons, or to deprive an individual of employment opportunities or limit these opportunities.[49] These provisions go in many ways further than those of our Act, but the pattern is the same. The principal difference is in the enforcement provisions. There is no equivalent of the regulation in the British Act by which complaints have to be referred to "a body of persons suitable to consider the complaint." It is the "Equal Employment Opportunity Commission"—the counterpart of our Race Relations Board—which plays a central role in the enforcement of the statute.[50]

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[40] s. 703.—For an excellent brief analysis of the present position with regard to the right to union admission, see Summers and Wellington, *Cases and Materials on Labor Law*, 1968, pp. 1063 *et seq.*

[41] National Labor Relations Act, ss. 8 (*a*) (3), 8 (*b*) (2).

[42] *Ibid.*, s. 8 (*a*) (3) Proviso.

[43] *Ibid.*, 8 (*a*) (3) Further Proviso A.

[44] *Ibid.*, s. 8 (*a*) (3).

[45] *Ibid.*, s. 8 (*b*) (2).

[46] *Ibid.*, s. 8 (*b*) (5).

[47] *Ibid.*, s. 10.

The Donovan Commission considered these problems at length, but in view of the close links between the Australian provisions and the system of compulsory arbitration, and the equally close link between the American provisions and the law of unfair labour practices, neither system could be of much assistance in formulating recommendations for this country. The special problems dealt with in the Race Relations Act were not included in the recommendations of the Commission: at the time when the Donovan Report was completed, the Race Relations Bill was pending before Parliament.[51] The Donovan Commission was thus mainly but not exclusively concerned with the relation between the closed shop and the union's discretionary power to grant or to refuse admission. It examined the pros and the cons of the closed shop and the question whether it should be made illegal altogether or in any of its manifestations, and answered this question unanimously, and, I think, convincingly, in the negative.[52] It found that "in some industries, it was impossible, or difficult, for a union to establish effective and stable organisation, without the help of the closed shop," and that in some other cases where it was "needed to deploy the workers' bargaining strength to the full." [53] It also found that some employers were in its favour.[54] The disadvantages were connected with the potential injustices to individuals and with the adverse economic effect of the limitation of access to skilled trades.[55] The economic side of the matter was dealt with by the elaborate proposals for a reform of industrial training,[56] which, it was thought, would lead to a revision of union rule books so as eventually to remove restrictions on access to the labour market. The Commission was, however, concerned to devise a scheme of protection of the individual against the adverse effect of arbitrary rejections of admission applications and arbitrary expulsions. These safeguards were "designed to protect individuals against unfairness and injustice, and not to remedy economic ills." [57]

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[48] s. 703 (c) (1).—Before this Act similar principles prevailed already under the Fair Employment Practices Acts of many states, and the Supreme Court of California had, in the absence of such a statute, affirmed the right to membership on constitutional grounds: *Thorman* v. *International Alliance of Theatrical Stage Employees*, 320 P. (2d) 494 (1958).—See Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System" (1958) 67 Yale L.J. 1327, esp. at p. 1343; Aaron and Komaroff, "Statutory Regulation of Internal Trade Union Affairs" (1949) 44 Ill.L.Rev. 425.

[49] s. 703 (c) (2).

[50] s. 705.—See for its operation Summers and Wellington, *loc. cit.*, pp. 59 *et seq.*

[51] Cmnd. 3623, para. 543.

[52] *Ibid.*, para. 603.

[53] *Ibid.*, para. 592.

[54] *Ibid.*, para. 593.

[55] *Ibid.*, paras. 596–597.

In the first place, to cope with cases such as the *Faramus* case, where the injustice is inherent in the rules themselves, it was proposed [58] that in future the rules should state who is qualified for admission, and that they should be framed so as to avoid discrimination, and further, that applicants should, under the rules, have a right to apply to the executive committee.

In the second place, the law itself should give the applicant a right to appeal from the executive committee to the Registrar of Trade Unions and through him eventually to a review body consisting of a legal chairman and two trade unionists. That body should, if it found that there was a case of substantial injustice, be entitled to make a declaration that the applicant should become a member, and this declaration should have the effect of making him a member. The further effect of this would be that a contractual relation between the applicant and the union was established by the declaration of the review body, and that any discrimination against him by the union would now be a breach of contract. The review body would also have the power of awarding limited monetary compensation.[59] It was envisaged that the vast majority of cases would be settled either by the executive committee inside the union or by the Registrar, one of whose duties it would be to promote an amicable settlement. The review body was considered as a kind of "long-stop." These, in outline, were the provisions of the Donovan Commission which were made unanimously, and these were the proposals the Government accepted in the White Paper *In Place of Strife*.[60] The White Paper emphasised [61] that:

> "This does not imply that there is any reason to suspect frequent injustice, any more than the creation of the Parliamentary Commissioner [the Ombudsman] implies that maladministration is common in Government Departments. But it is right and healthy in a democracy that any powerful body should be subject to outside scrutiny where abuse of power can most harm the individual."

All twelve members of the Royal Commission found this line of thought convincing, and I still find it convincing. I know of nothing which has happened since the publication of the White Paper a year ago, to deprive this argument of its force.

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[56] *Ibid.*, paras. 618, 858.

[57] *Ibid.*, para. 618.

[58] *Ibid.*, para. 690.

[59] *Ibid.*, paras. 609–618; 658–661.

[60] Cmnd. 3888, paras. 114–116.

[61] *Ibid.*, para. 114.

(b) The second problem is how to protect union members against capricious, arbitrary or discriminatory expulsions. Again, it is quite clear that in this country the problem does not arise in practice frequently, but again this is no answer to a plea for the intervention of the law where the problem arises.

The technical legal problems attaching to this matter are less serious than those connected with admissions. Here the lawyer has a legal peg on which to hang human rights. It is the contract of membership between the individual and the union, a contract the " terms " of which are to be found in the rule book of the union.[62]

The courts have developed a body of protective principles, and the case law on wrongful expulsion is too voluminous to be discussed here in any detail.[63] Whereas a member can usually quit the union at will, the union cannot expel him except in so far as its power of expulsion is set forth in the contract of membership, *i.e.* on the grounds [64] and through the procedures [65] laid down in the rules. The grounds may be expressed in the form of " omnibus " clauses (acting contrary to the interests of the union, unfair competition, etc.), but the courts reserve to themselves the ultimate power of interpreting the rules.[66] Yet it is easy to hide discrimination behind their nominal observance. This is again a situation analogous to that of discriminating against unionists by dismissing a man for a breach of discipline which management would condone in others. A union can use one of its numerous specific or general expulsion clauses and nominally observe the contract of membership while in fact seeking to get rid of a spokesman of an unpopular and dissident minority. I am not saying that this happens frequently, but the courts certainly cannot prevent it under the present law,[67] and for the present discussion, it is the marginal case that matters, just as it does in the parallel situation of the abuse of managerial power. Nor does the doctrine known as that of "natural justice" help very much, because all it means is that before being expelled a man should be given a hearing and an opportunity of stating his case [68] and that—a highly problematical point in view of the state of the case law [69]—those deciding about the expulsion should be reasonably unbiased—a very elastic concept.

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[62] *Bonsor* v. *Musicians' Union* [1956] A.C. 104.

[63] For summaries see Grunfeld, *Modern Trade Union Law*, 1966, Chap. 9; Citrine-Hickling, *loc cit.*, pp. 265, *et seq.*; Rideout, *supra*, pp. 91, *et seq.*; Lloyd, " Disciplinary Powers of Professional Bodies " (1950) 13 M.L.R. 281; *ibid.*, " Judicial Review of Expulsion by Domestic Tribunals " (1952) 15 M.L.R. 83; *ibid.*, " Expulsion from a Trade Union as a Tort " (1958) 36 Can. Bar Rev. 83; for Canada: Whitmore, " Judicial Control of Union Discipline: The Kuzych Case " (1952) 30 Can. Bar Rev. 1 and *ibid.* 525; 32 Can. Bar Rev. (1954) 201; (1956) 34 Can. Bar Rev. 483. Some of the most recent English cases are mentioned in the following footnotes.

[64] Leading cases: *Amalgamated Society of Carpenters and Joiners* v. *Braithwaite* [1922] 2 A.C. 440; *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329 (C.A.). See also *Spring* v. *National Amalgamated Society of Stevedores* [1956] 1 W.L.R. 585.

[65] For two very clear recent cases affirming this principle see *Hiles* v. *Amalgamated Society of Woodworkers* [1968] Ch. 440; *Braithwaite* v. *Electric, Electronic and Telecommunications Union—Plumbing Trades Union* [1969] 2 All E.R. 859 (C.A.).

[66] See especially *Amalgamated Society of Carpenters, etc.* v. *Braithwaite*; and *Lee* v. *Showmen's Guild*, *supra*, note 64.

[67] The courts cannot prevent the abuse of an " omnibus " clause on expulsion, still less can they prevent the abuse of the power to refuse re-admission in the

Nevertheless the law on expulsion, though insufficient, provides much better safeguards than the law governing admission, and these have been improved in recent years. The courts no longer insist—if they ever did [70]—that before impugning an expulsion in the courts, the member must first exhaust all the internal remedies the union's constitution gives him.[71] Protection against wrongful expulsion would indeed be a mockery if, before approaching the court with a request to give him redress, the member had first to put his case before the annual or biennial conference of the union, especially if in the meantime the expulsion and possibly the resulting loss of a job were allowed to take effect.[72] Nor do the courts now permit the union to exclude in its rules a member's recourse to the courts, either directly or indirectly, by laying down that the opinion of the branch committee or of some other body inside the union should be conclusive as to the existence of a ground for expulsion.[73] In all these respects the courts have become more liberal in recent years. And it has also been the law, since the

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event of forfeiture of membership under the rules through non-payment of subscriptions for a stated period. On this problem see Rideout, *loc. cit.*, p. 9, *et seq.*, and see below, text to note 8.

[68] See *e.g.*, *Annamunthodo* v. *Oilfield Workers' Union* [1960] A.C. 945 (P.C.); *Lawlor* v. *Union of Post Office Workers* [1965] Ch. 718.

[69] Compare *McLean* v. *Workers' Union* [1929] 1 Ch. 602 with *Taylor* v. *National Union of Seamen* [1967] 1 W.L.R. 532.

[70] *White* v. *Kuzych* [1951] A.C. 585 (P.C.) is inconclusive. As Lord Denning pointed out in the *Annamunthodo* case, *supra*, at p. 956, the plea that internal remedies must be exhausted was upheld in *White* v. *Kuzych* owing to "special circumstances." These "special circumstances" were created by the altogether unusual union rule which imposed upon a member an express contractual duty to exhaust all internal remedies before becoming a party to a suit in court. This was pointed out by Ungoed-Thomas J. in the *Lawlor* case, quoted in the next note. See also Grunfeld, *loc. cit.*, p. 196. Whether an English court would today regard as valid the rule of the Canadian trade union which was before the Privy Council in *White* v. *Kuzych* appears to be very doubtful. Is this not an "ouster of the jurisdiction of the court"? See note 73 below.

[71] *Lawlor* v. *Union of Post Office Workers* [1965] Ch. 718; *Leigh* v. *National Union of Railwaymen* [1970] 2 W.L.R. 60 (where Goff J. suggested that it is in the discretion of the court to grant or not to grant relief prior to the exhaustion of internal remedies, but that it would more readily do so if there was no such clause as that in *White* v. *Kuzych*). See further note 5, *infra*.

[72] As they did in the *Lawlor* case, but not in *White* v. *Kuzych*. This may be a relevant difference between the two cases. Note also that the *Lawlor* case was not a closed shop situation, a point expressly noted by the judge.

[73] This was first adumbrated by Denning L.J. in *Lee* v. *Showmen's Guild*, *supra* note 64 and is now clearly accepted by the courts: see the *Lawlor* case and the *Leigh* case, *supra* note 71.

well-known decision of the House of Lords in *Bonsor* v. *Musicians' Union*,[74] that a member who has been wrongfully expelled can claim not only reinstatement but also damages—especially important in a closed shop situation like that which was then before the court.

I am saying nothing about the technical difficulties which had to be overcome even in this question of wrongful expulsions before the law could reach the stage—the unsatisfactory stage—of development at which it has now arrived. These difficulties were connected with a highly involved and now perfectly useless provision—section 4 of the Trade Union Act 1871, which restricts a member's right of action against the union (and also the union's right of action against the members) and which nine out of the twelve members of the Donovan Commission considered as ripe for repeal.[75]

What is much more important is whether more cannot be done to prevent discrimination and injustice. Here again the Race Relations Act of 1968 may be a signpost. It says [76] that it is unlawful to discriminate against a member by expelling him from the organisation, but all I have said about the complexities of the enforcement machinery [77] applies to expulsions as well as to admissions, and the discrimination envisaged by the Act is, of course, only discrimination on the grounds of colour, race or ethnical or national origin,[78] not, for example, by reason of political opinion or personal animosities.

The law of the Commonwealth of Australia, and in a very different way, the Federal law of the United States go further in protecting the individual.

Under the Commonwealth Conciliation and Arbitration Act, an organisation registered under the Act and thus entitled to participate in the compulsory arbitration system may expel a member who does not comply with the rules, but (as in this country) only for that reason.[79] On the other hand, a member may resign if he leaves the industry and otherwise on giving three months' notice and paying all dues.[80] The membership may also be terminated by the Commonwealth Industrial Court on the application of the union.[81] To this extent therefore, the Australian law is, if anything, less favourable to the member than the law as developed by the courts in the United Kingdom. This, however, is balanced by a much more far-reaching control over the rules themselves,—and, in view of what I have said about "omnibus" clauses, this is important. No rule may impose upon a member "conditions, obligations or restrictions, which, having regard to the objects of the Commonwealth Conciliation and Arbitration Act and the purposes of the registration of organisations" under it, "are oppressive, unreasonable or unjust." A contravening rule may be declared void on the application of a member.[82] Moreover, if the rules have been administered in such a manner that conditions, obligations or restrictions have been imposed on members which are thus "oppressive, unreasonable or unjust," the court may order the organisation to be de-registered (which from the point of view of industrial relations may be the equivalent of a death sentence) or it may alternatively impose the milder sentence of declaring the rule to be void.[83] This may be a remedy against a discriminatory use of omnibus clauses. It may also be a remedy against an oppressive application of forfeiture or lapse clauses operating in the event of non-payment of dues. I am not suggesting that these far-reaching provisions have a tremendous practical importance in the routine of Australian labour law, nor am I suggesting that they can be easily divorced from the compulsory arbitration system of the Commonwealth, but they show an interesting pattern of legislation all the same.

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[74] [1956] A.C. 104. See however *Abbott* v. *Sullivan* [1952] 1 K.B. 189 (C.A.)—a very dubious decision.

[75] para. 814. The once highly controversial question whether s. 4 stood in the way of an action for wrongful expulsion was, once and for all, answered in the negative by the House of Lords in *Amalgamated Society of Carpenters, etc.* v. *Braithwaite* [1922] A.C. 440.

[76] s. 4 (1) (*b*).

[77] See *supra* note 27.

[78] s. 1.

[79] s. 144 (1).

[80] s. 145.

[81] s. 150.

In the United States [84] one has to distinguish between legislation enacted to protect employees against being arbitrarily deprived of their jobs; legislation directed against discrimination because of race, colour, religion, sex or national origin; and legislation designed to safeguard broad principles of due process of law, or, if you prefer the term, "natural justice." [85]

The pre-entry closed shop is—as we have seen—forbidden, and the general policy to make what we should call the post-entry closed shop incompatible with the "closed union" is applied to expulsions as well as to admissions.[86] Where a "union shop" is in operation under an agreement between a union and an employer, the union is still free to expel a member for any reason that its rules permit, but if they expel him on any ground other than non-payment of dues, the "union shop" agreement no longer applies to him, and this means that the employer may not dismiss him nor may the union attempt to induce the employer to dismiss him by reason of his non-membership.[87] Indirectly this is the most far-reaching restriction of union autonomy in the matter of membership termination of which I know. It is quite a heavy price to pay for what is called "union security."

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[82] s. 140 (1) (c), (2).

[83] s. 143 (1) (d) and (8B).

[84] The volume of the American literature on the subjects here under discussion is colossal. For a comparison of the situations in America and in England see the valuable book by J. Grodin, *Union Government and the Law*, Los Angeles, Univ. of California Institute of Industrial Relations, 1961. See further note 89, *infra* and also: Summers, "Disciplinary Powers of Unions" (1950) 3 Ind. & Lab. Rel. Review 483; "Disciplinary Procedures of Unions," *ibid.* Vol. 4 (1951), p. 15; "Legal Limitations of Union Discipline" (1951) 64 Harv.L.R. 1049; "The Law and Union Discipline. What the Courts do in Fact" (1960) 70 Yale L.J. 175.

[85] For an analysis of the two concepts in the present context see Rideout, *loc. cit.*, pp. 91, *et seq.*

[86] See above, note 41.

The policy of the Civil Rights Act of 1964 is to proscribe discrimination by reason of race, colour, religion, sex or national origin—a matter obviously of infinitely greater importance in America than here. Expulsion from a union by reason of such discrimination is an "unlawful employment practice"—one may surmise that in practice this is far less important than the corresponding provisions on admission or, above all, on unequal treatment especially in the matter of "employment opportunities." [88]

Lastly—and this is the most interesting aspect of the present American Federal law—the Labor-Management Reporting and Disclosure Act of 1959,[89] commonly known as the Landrum-Griffin Act, has important things to say about expulsions. It says nothing about admissions—one can guess that this "potato" would have been too "hot" for Congress even in the reforming mood in which it passed this Act, but it includes in the "Bill of Rights of Members of Labour Organisations" a clause [90] codifying broadly those principles which the English courts dignify with the name of "natural justice." The clause says that no member may be "fined, suspended, expelled or otherwise disciplined" except for non-payment of dues, unless he has been served with written specific charges, been given a reasonable time to prepare a defence, and afforded a full and fair hearing—all this notwithstanding any rule to the contrary. This is not very revolutionary, nor is it as effective as it looks. The corresponding principles of English law would not be of much use if it were not for the availability of legal aid. In the absence of legal aid being available, the provision of the American statute might be an effective remedy if the Federal Secretary of Labor had the power to enforce it by bringing an action, or ordering an investigation. But the powers of the Secretary of Labor to do these things (which are available for the enforcement of other provisions of the Act [91]) are expressly excluded as regards the "Bill of Rights [92]—the Southern Senators could not in 1959 face the enactment of a Bill of Rights enforceable through

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[87] National Labor Relations Act, s. 8 (a) (3) Proviso 2B, and s. 8 (2) (b).

[88] s. 703 (c) (1) and (2).

[89] For an English reader the most accessible analysis of the Act is Summers, "American Legislation for Union Democracy" (1962) 25 M.L.R. 273. See further *e.g.* Aaron, "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 73 Harv.L.Rev. 851; Cox, "The Role of Law in Preserving Union Democracy" (1959) 72 Harv.L.Rev. 609; *ibid.*, "Internal Affairs of Unions under the Labor Reform Act of 1959" (1960) 58 Mich.L.R. 819; Smith, "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 46 Virginia L.Rev. 195.

[90] s. 101 (*5*).

[91] ss. 210, 304, 402, 601.

[92] s. 601.

Federal action.[93] In the nature of things there can be no "contingency fee"—it is not easy for an outsider to see what good this "Bill of Rights" can do in practice. The only case of discriminatory expulsion in which the Secretary of Labor can intervene is that of disciplinary action taken against a member for exercising his rights under the Act itself, *e.g.* with regard to trade union elections.[94]

The Donovan Commission was thus not able to derive much inspiration from Australian or from American law.

One of the main miseries of the present situation in this country is the state of the unions' rule books. Everyone who has in practice had anything to do with them knows that they are in a state of chaos—one layer of rules has been piled on another—and they tax a lawyer's art of interpretation sometimes to breaking point.[95] The first step to a reform must be the clarification and improvement of the rule books, and this is clearly the most important of the recommendations made by the Donovan Commission in this area.[96] A code of discipline must be clear and precise—an elementary requirement of justice.

Next, the Donovan Commission proposed that, as with refusals to admit, there should be an appeal against expulsion and other disciplinary measures, first to the Registrar (who should try a settlement) and from him to the independent review body. The review body could, if the applicant had suffered "substantial injustice," in certain limits order the union to pay compensation.[97] It could also order reinstatement in the union, but the Donovan Commission failed to say that such an order should automatically put an end to the expulsion. There is here a discrepancy between the recommendations on refusal to admit and those on expulsion [98] which the Government redressed in the White Paper.[99]

Of course, if the union has broken its own rules, for example by not observing the right procedure or by expelling a member for a reason not mentioned in the rule book or if it has not given him a fair hearing before a reasonably impartial committee, he can even now get redress in the courts,[1] and the Royal Commission proposed that the review body should also have the power to give him that redress,[2] but "substantial injustice" can be done even where the rule book and the rules of natural justice have been observed. Thus, under most rule books a member is not expelled for failure to pay his dues, but forfeits his membership automatically. This forfeiture can be waived by the union and if this power is used unfairly, waiving forfeiture in one case and not in another—the courts cannot do anything at all at the moment.[3] This is one situation in which the review body could help. Besides its procedure would be quicker and cheaper than that of the courts—and the Donovan Commission also recommended that legal aid should be made available for proceedings before the review board.[4]

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[93] See Summers (1962) 25 M.L.R. 290, note 67.

[94] s. 609.

[95] See Rideout, "The Content of Trade Union Rules as to Discipline" (1965) 3 *British Journal of Industrial Relations* 53.

[96] Cmnd. 3623, para. 651.

[97] *Ibid.*, paras. 615, 631, 660.

[98] paras. 618 and 631.

[99] Cmnd. 3888, para. 116.

[1] See text to notes 63–74 above.

[2] Cmnd. 3623, para. 665.

It is only right that within certain limits a member complaining of unfair expulsion or other disciplinary measures should first of all seek to get redress in the union itself, and the Donovan Commission recommended that the proceedings before the review board should be started immediately on expulsion or the imposition of a fine or whatever it may be, but should be stayed until the internal union procedures were exhausted. They should not however be stayed for more than three months unless the domestic appeal mechanism in the union had the effect of postponing the expulsion or whatever it was. In that case the proceedings before the review board should be stayed beyond the three months unless the delay is expected to be or turns out to be too long.[5]

All these proposals were, and were intended to be, strictly parallel to those on unfair dismissals by employers[6]—they are interlocking checks on the abuse of managerial and the abuse of organisation power. The Donovan Recommendations on dismissals and expulsions are better balanced than those on admissions: there are no recommendations on unfair refusal to employ although the Race Relations Act 1968[7] shows that such provisions are not impossible.

Here again in its White Paper the Government accepted[8]—and, as said above, in one respect improved the Commission's Recommendations.[9]

III

So far I have spoken about the right to become and the right to remain a trade union member—but it is not only the right to membership but also the rights arising from membership which deserve the attention of the law. These rights are of two kinds: the member may be able to claim that the union should do certain things for him: pay benefits of various kinds, give him advice and legal assistance, represent his interests in collective bargaining negotiations or court proceedings, allow him to participate on equal terms with others in such educational or recreational facilities as the union provides. On the other hand, the member may, under the union's constitution, be entitled to participate in the decision-making processes of the union, directly by being elected to committees or executive posts, or by participating in votes and ballots, or indirectly by participating in the election of committee members or office holders. Only two issues are of potential practical importance: that of equal representation and that of equal participation.

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[3] See above, note 67.

[4] Cmnd. 3623, para. 668.

[5] *Ibid.*, para. 663. See note 71 above. For a different though similar legislative solution see the American Labor-Management (Reporting and Disclosure) Act 1959, s. 101 (a) (4) proviso (1). This matter is badly in need of legislative regulation in this country.

[6] Cmnd. 3623, Chap. 9.

[7] s. 4.

[8] Above, note 99.

[9] Cmnd. 3888, para. 116.

(a) The right to equal representation has become a major issue in the United States,[10] but this is largely due to the structure of American law under which the union is the "statutory bargaining representative" not only of its own members, but also of non-organised workers in the plant, class or craft which has been designated as the statutory bargaining unit. Moreover, the immense importance of this issue in America stems from the racial structure of the nation and from the habits of a number of unions, *e.g.* railway brotherhoods, of discriminating in their collective bargaining negotiations between white and black workers. This was the background of the great decisions of the Supreme Court imposing on the unions the obligation to bargain without discrimination between categories of members or between members and non-members.[11] No similar problem has arisen in this country, but the matter is covered by the Race Relations Act of 1968. If a union were to bargain with an employer or employers on terms involving discrimination on the grounds of colour, race or ethnic or national origins it would act unlawfully. By doing this, the union would, in the words of section 4 (1) (*b*) of the Act, refuse or deliberately omit to take the like action on behalf of one member as is taken on behalf of others, and this inequality of treatment, if discriminatory within the meaning of the Act, is unlawful. Nor would it matter whether all this was about the distribution of jobs, *e.g.* access to skilled or semi-skilled work, or to lucrative opportunities of earning overtime pay, or to the order of dismissals in redundancy cases, or anything else. To bargain for such discriminatory terms would, for the union, be an unlawful act. To apply them would (under another section of the Act[12]) be an unlawful act by the employer, and, as already pointed out, by tolerating it the Government might violate the European Social Charter.[13]

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[10] There is a vast body of case law, and the literature is immense. This has become one of the prime issues of labour law in the United States. For a very good first introduction: Summers and Wellington, *loc. cit.*, pp. 32–78. Further: Gould, "Employment, Security and Race" (1967) 13 How.L.J. 1; Wellington, "Union Democracy and Fair Representation" (1958) 67 Yale L.J. 1327; Summers, "The Right to Join a Union" (1947) 47 Col.L.Rev. 33; Grodin, *loc. cit.*, above note 34, p. 177 *et seq.*

[11] Much the most important of these is *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U.S. 192 (1944), a decision of the United States Supreme Court of exceptional importance—far beyond the subject here under discussion.

[12] s. 3.

[13] Art. 19, para. 4, which imposes on the United Kingdom the obligation to secure for workers who are citizens of one of the other Contracting Parties treatment not less favourable than that of United Kingdom citizens in respect not only of membership of trade unions but also of the "enjoyment of the benefits of collective bargaining."

Agreements between unions and employers by which foreign workers are to be dismissed before British workers in the event of redundancy are now unlawful—I am not saying that they are void because they are not contracts in the legal sense.[14] It can of course be unlawful to enter into an agreement which exists outside the law as far as its own enforcement is concerned. The Race Relations Act does not however cover religious discrimination. Nor does it apply to Northern Ireland.

(b) Let me turn to the question of equal participation. Should the law do anything—and what—to protect what is called trade union democracy? This may mean two things. The law can be invited to ensure that union constitutions comply with certain standards of democracy—regular elections, grant of facilities to promote candidatures, etc.—*i.e.* impose on the unions certain constitutional principles formulated by law. The law can also—a very different thing—play a role in guaranteeing to members such democratic rights as the union constitutions give them: participation in elections, right to stand for offices or for committee membership, guarantees that election results will be honestly and carefully recorded and promulgated. Here the law does not impose anything from above but merely provides sanctions for the union's self-created norms.

(i) Can the law impose on unions principles of " democracy "? Should it do so? This raises the most difficult of all the problems of trade union law. Can there be such a thing as " trade union democracy "? Can the pattern established for elections in political bodies be transferred to the government of trade unions? It is a big question and only brief indications are given here.

The dilemma of trade union democracy is that it is supposed to be a democracy without parties. There can be no parties inside a trade union as there are parties in the State or in a local authority, and this for the reasons that the union is a voluntary body which is always threatened by secession and that it exists for a definite purpose and for a definite interest, the purpose to secure advantages for its members through negotiation, and if necessary, industrial sanctions. A union is a fighting organisation—its purpose and the interest for which it stands are not open to debate. All these are characteristics which trade unions share with other interest and pressure groups, whether the purpose be economic or " ideal "—trade associations, consumers' organisations, religious sects, charitable bodies, sports clubs, and all the rest. Membership in a football club cannot be used for the purpose of replacing soccer by American football; those who do so are in fact agitating for a split in the organisation. In a voluntary one-purpose body one does not talk about " parties," but about factions or coteries, grouped around persons. If these go too far, they approach the threat of secession, of break-away, the ultimate crime. In the United States there has been a great deal of discussion about how far democratic forms of government are compatible with the life of a voluntary organisation,[15] and one, it appears not unsuccessful, attempt has there been made to introduce into a trade union a kind of " party government," the parties being a militant and a less militant group, distinguished not by their purposes or by the interests they represent, but by their methods.[16] I cannot see this happening in this country or elsewhere in Europe.

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[14] See *Ford Motor Co. Ltd.* v. *A.E.F.* [1969] 2 All E.R. 481.

It is extraordinarily difficult to prescribe patterns of democratic decision-making where the selection of the decision-makers is supposed not to be based on programmes or platforms, but exclusively on personal merit. How can one transfer to this situation principles on frequency of elections, on freedom of canvassing, on the distribution of functions between elected and appointed office holders? Does one not run the risk, by insistence, *e.g.* on frequent elections, on freedom of canvassing, on the prevalence of elective offices, to promote a permanent fight between groups based on external, political allegiances? And, whether this danger is real or imaginary, this must surely be a matter which the law should severely leave alone.

(ii) Thus, whatever may have been the state of affairs which in the United States led to the enactment of the far-reaching relevant provisions of the Federal Labor-Management (Disclosure and Reporting) Act of 1959 (the Landrum-Griffin Act),[17] in this country the role of the law must be confined to the more modest task of guaranteeing to the individual member the observance of union constitutions adopted by the unions autonomously, and of protecting him against malpractices in financial administration and in the conduct of elections.

The financial side of things is reasonably well looked after by the publicity provisions of the Trade Union Act of 1871,[18] combined with the application by the courts of certain principles of the law of trusts to the relation between the union and its members.[19]

Any use of funds for purposes not authorised by the union rules (which are to this extent a " trust instrument ") is a breach of trust which can be checked by injunctions and for which the trustees can be made accountable on principles known to every law student, and which have been applied to trade unions ever since the House of Lords decided the famous *Howden* case in 1905.[30] Election malpractices can also eventually be stopped by law, as the Electrical Trades Union case showed, but you have to prove a civil conspiracy at common law, and in the E.T.U. case it is said to have cost £80,000.[31] We can all agree that the British trade unions are today financially above board, and that scandals such as that in the E.T.U. are very rare occurrences. Is this good enough? Many unions do not think so and have entrusted an outside body such as the Electoral Reform Society with the task of conducting ballots and ascertaining election results. Is it not the task of the law to do something about this as well as about arbitrary non-admission or expulsion? Should not the individual member have at his disposal a method of checking alleged financial and, much more important, election malpractices, less clumsy, complicated, expensive and nerve-racking, and more speedy and effective than an action for breach of trust in the Chancery Division or an action for civil conspiracy in the Queen's Bench Division of the High Court.[*] This is what the Donovan Commission—following to some extent the Australian example [32]—sought to achieve by making proceedings before the Registrar and a review body available in such situations.[33]

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[15] Perhaps the best discussion of the problem is Lipset, " The Law and Trade Union Democracy " (1960) 47 Virginia L.Rev. 1 where a bibliography will be found at p. 10, note 20. See further: Summers, " The Usefulness of Law in Preserving Union Democracy " (1959) 48 American Economic Review 44; *ibid.*, " Judicial Regulation of Union Elections " (1961) 70 Yale L.J. 1221. The case against " union democracy " is stated *e.g.* by Magrath, " Democracy in Overalls, The Futile Quest For Union Democracy " (1959) 12 Ind. and Lab. Rel. Rev. 503.

[16] The famous experiment made by the International Typographical Union is analysed in detail in Lipset, Trow and Coleman, *Union Democracy*, 1956.

[17] For an analysis of the provisions of Title IV on Union Elections see Summers (1962) 25 M.L.R. at pp. 290–296.

[18] ss. 13–16 and Sched. 1

[19] Since *Yorkshire Miners' Association* v. *Howden* [1906] A.C. 256. See *Citrine*, *loc. cit.*, pp. 181 *et seq.*; Grunfeld, *loc. cit.*, pp. 124 *et seq.*

IV

Let me, in conclusion, emphasise once more that the argument in favour of legislation to protect the individual is not based on widespread abuses, but if a wrong has been done it is no comfort for the victim that his case is exceptional. Lawyers and law-givers, let me say it again, must argue in ways which differ from those of empirical social scientists.

Some trade unionists, however, oppose legislation of this kind, not only because they feel that in the main they have a good conscience in these matters. There are other reasons for opposition as well.

More than forty years ago an American law teacher of exceptional insight and eloquence, Professor Zechariah Chafee of Harvard, wrote an article on the relation between the law and voluntary associations such as trade unions.[34] He analysed the attitude of the courts here and in the United States, and at the end of the article [25] he tried to formulate the policies which lie behind these attitudes. One of these is what he called the " living tree " policy, another is the "dismal swamp" policy. This means that the court, if it is well advised, will recognise that autonomous bodies such as trade unions develop their own customs, norms, institutions, mores, and that these must be allowed to grow like a tree without being stunted by the law. And often, to change the simile, these mores and norms—think of union rule books—are so involved and obscure, intractable and inaccessible, that an outsider, such as a judge who seeks to penetrate them, will soon lose his foothold in a " dismal swamp." The trade unions are entitled to claim, especially in this country, that their norms and institutions express a " sub-culture " and that the courts have in the past shown their inability to understand it. Chafee's living tree and dismal swamp arguments are not to be despised. They are arguments in favour of non-intervention.

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[30] See above note 19.

[31] *Byrne and Chapple* v. *Foulkes, Haxell and others*: see Cmnd. 3623, paras. 643–644.

[32] Commonwealth Conciliation and Arbitration Act 1904–1961, Part IX, ss. 159–171.

[33] Cmnd. 3623, paras. 645–648.

[34] Zechariah Chafee Jr., "The Internal Affairs of Associations Not For Profit" (1930) 43 Harv.L.R. 993.

So is what he calls the " hot potato " argument. Problems like those of the control of the labour market, the closed shop, admission or rejection on economic grounds, training and apprenticeship, are policy problems and power problems. They must be argued out between organised management, organised labour and government as problems of economic policy, and of the distribution of power, and not in a court which is ignorant of these things and has no access to the relevant facts. So " hands off " is the best policy.

Seen from the angle of the unions, the " hot potato " argument may however be distorted into what I should like to call the " trauma of the Trojan horse." Experience has shown that employers and their organisations or political parties have mobilised trade union dissidents or minorities as allies in a hostile camp. The cases of *Howden*,[26] and more famous, of *Osborne* [27] are illustrations. Courts which ignore Chafee's " hot potato " argument do so at the peril of unwittingly playing the role of Ulysses in Troy and becoming instruments in a power struggle made up to look like a fight for human rights and civil liberties. The unions know this, and their opposition to legal intervention in the relations between themselves and their members can to some extent be explained in the light of this experience. The dead hand of history lies over all these problems.

All this is understandable. It is the heritage of a time when the unions had to struggle for their existence, and when their power in society was not comparable to what it is now. It is now time that the dead hand of history should be removed. It is time to see that there may be cases in which that which Chafee called the " stranglehold " argument pulls in the opposite direction: that the union may have a stranglehold over the life of an individual, and that the individual can claim the protection of the law.

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[25] pp. 1020–1029.

[26] Note 19 above.

[27] *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87.

All this should be done with caution and with a realisation that the distrust of the unions against the courts and the lawyers is well grounded in the hostility which the courts have often shown to the union movement and sometimes still show. Yet the unions are an essential element of the body politic. They cannot afford any moral stigma attaching to what is or seems to be injustice in the treatment of the individual. Cautious protective measures such as those recommended by the Donovan Commission are ultimately in the interest of the trade unions themselves.

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RECENT DEVELOPMENTS IN THE LAW OF SEARCH AND SEIZURE

In 1967, my colleague, Mr. D. A. Thomas, concluded that "... the law consists of a mass of statutory provisions, to which judicial decisions add confusion rather than clarity." [1] Since that time, confusion has been compounded. The decisions of the Court of Appeal in *Chic Fashions (West Wales) Ltd.* v. *Jones* [2] and *Ghani and Others* v. *Jones* [3] have rendered the law relating to police powers even more obscure than it was formerly and it is now almost impossible to write on the topic with any certainty. The *Chic Fashions* case sanctioned, in relation to search warrants for stolen goods, the rule that a constable may seize under warrant goods not specified in the warrant where he reasonably believes them to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him. This power has since been provided for by statute in relation to the law of theft and the correctness of the decision is not a matter of concern in connection with theft and handling.[4] *Ghani* v. *Jones*, however, not only lays down a sweeping new rule concerning the seizure of property from the person, but also, founding in part on *Chic Fashions* and in part on *Elias* v. *Pasmore*,[5] suggests that a constable can seize from premises which he has entered lawfully, property of evidential value in connection with the crime which he is investigating. This power enables him to seize material of evidential value against the person whom he is investigating or anyone associated with him in the offence. Both aspects of *Ghani* v. *Jones* are of the first importance. It has never been thought to be the law that property can be seized otherwise than on arrest or pursuant to a warrant. The former aspect of *Ghani* v. *Jones* is unprecedented; the latter aspect is apt, if followed, to sweep away the limitations contained in statutes authorising search warrants. Statutory powers to issue search warrants differ markedly in the conduct which they authorise. The Theft Act 1968 enables a constable to seize the articles specified in the warrant or any other articles which he reasonably believes to be stolen. Similarly, the Firearms Act 1968 authorises the constable to whom it is issued to seize and detain any firearm or ammunition which he may find on, *inter alia*, the premises or place and in respect of which he has reasonable grounds for suspecting that a firearms offence has been, is being, or is about to be committed.[6] The like wording is employed under legislation dealing with drugs,[7] obscene publications,[8] explosives,[9] and official secrets.[10] On the other hand, warrants issued under the Forgery Act 1913 empower the seizure only of the articles specified in the warrant.[11] Similar specific provisions which give no discretion to a constable are to be found under several other statutes.[12] *Chic Fashions*, as interpreted by *Ghani* v. *Jones*, is apt to subvert the limitations imposed by these statutes. At the least, in the case both of the search of premises and of the person Parliament has been substantially anticipated. For in the latter case, one had assumed that only under "stop and search" legislation could a person who had not been arrested be searched. Commonwealth courts certainly have proceeded on such an assumption.[13] No case holds that constables may detain property without making an arrest. *R.* v. *Waterfield and Lynn* [14] is a direct authority to the contrary. In both the *Chic Fashions* and the *Ghani* cases, the Court of Appeal purports to justify its decision by reference to authority. It is therefore instructive to determine what the common law does authorise. To determine the answer to this question one must turn both to the cases dealing with warrants to enter and search premises, and to the cases dealing with search on arrest. It is proposed to commence with the cases dealing with the search of premises and then to those dealing with search of the person since these, though originally distinct lines of authority, merged to produce a confusing result in a line of cases culminating in *Chic Fashions* and *Ghani* v. *Jones*.

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[1] Thomas, " The Law of search and seizure: further ground for rationalisation " [1967] Crim.L.R. 5.

[2] [1968] 2 Q.B. 299.

[3] [1968] 3 All E.R. 1700 (C.A.)

[4] Theft Act 1968, s. 26 (1)

[5] [1934] 3 K.B. 164.

Common law powers to issue search warrants were limited to searches for stolen goods. Warrants were issued by magistrates. No other person had authority to do so. Furthermore, warrants, the issue of which could not be attributed to a power recognised by law were void, and entry under them was trespassory. These rules, stated in *Leach* v. *Money* [15] and *Entick* v. *Carrington*,[16] were clear, fundamental, and adhered to for nearly two centuries. The detailed legal rules relating to search warrants were strict. Until recently it was thought to be the law that where a warrant was issued to search for stolen goods, the goods specified in the warrant,[17] or other goods not so specified if these ". . . had been likely to furnish evidence of the identity of the goods stolen" could be taken.[18] The seizure of goods could be justified on one of two bases and not otherwise; as seized from the person of the accused at the time of his arrest,[19] or by showing that the seizure was authorised under a search warrant. Some cases admittedly allowed the result of an unlawful search to serve as an excuse, though not a justification, therefor.[20] This was not a principle generally applied.[21] In general, search warrants like all other warrants, had to be executed in strict compliance with the law authorising their issue.[22]

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[6] Firearms Act 1968, s. 46 (1) (*b*).

[7] Dangerous Drugs Act 1965, s. 14.

[8] Obscene Publications Act 1959, s. 3.

[9] Explosives Act 1875, s. 73, and see Malicious Damage Act, s. 55.

[10] Official Secrets Act 1911, s. 9.

[11] Forgery Act 1913, s. 16 (1).

[12] *e.g.* Criminal Libel Act 1819, s. 1, Pawnbrokers Act 1872, s. 36, Coinage Offences Act 1936, s. 11.

[13] *Blundell* v. *Att.-Gen.* [1968] N.Z.L.R. 84.

[14] [1964] 1 Q.B. 114.

[15] (1765) 19 St.Tr. 1002.

[16] (1765) 19 St.Tr. 1029.

[17] *Price* v. *Messenger* (1800) 2 B. & P. 158.

These strict principles were departed from in *Elias* v. *Pasmore*.[23] In that case, Horridge J. allowed as an excuse, the success of a search of premises not justified under any search warrant. The apparent basis for this decision was that the interests of the state excuse the otherwise unlawful seizure of documents if it later appears that the documents afford evidence of a crime committed by anyone. That decision, which seems to rest on an extensive view of the powers of the police to seize documents on the person of an arrested individual was manifestly unsatisfactory.[24] To the extent that the decision relied on cases establishing a right to search the person on arrest, it misconceived the limited powers conferred by the cases. In only one English case has search incidental to arrest been allowed where the search was not for an article on the person of the accused. That case is not persuasive and has seldom, if ever, been alluded to by an English court.[25] Furthermore, apart from a search for and seizure of dangerous articles on the person of the accused,[26] search and subsequent seizure may only be asserted in respect of things in the possession or control of the arrested person which may afford evidence of a crime committed by him.[27] *Elias* v. *Pasmore* could not be justified either on these cases or on the search warrant cases. In excusing the seizure of articles in premises where the accused was found, provided that they furnished evidence of a crime committed by someone, the court in *Elias* v. *Pasmore* was clearly sanctioning a novel and illogical departure; novel because it was not supported by the authorities; illogical because it admitted the success of the search as an excuse but did not thereby render the search lawful. It may be questioned what the position of an occupier who forcibly resisted such an extended search would be. By analogy from the law of arrest, one would expect him to have been legally justified in doing so, at least if he stopped short of the use of lethal force.[28]

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[18] *Crosier* v. *Cundy and Others* (1827) 6 B. & C. 232; *Key* v. *Grover and Another* (1831) 7 Bing. 312.

[19] *Levine* v. *Stewart* [1930] V.L.R. 70; *Barnett & Grant* v. *Campbell* (1902) 21 N.Z.L.R. 484, and see Attenborough, *Recovery of stolen goods* (1906), pp. 213–214.

[20] *Pringle* v. *Bremner & Stirling* (1867) 5 MacPh. 55. The like principle was sometimes asserted in relation to searches under Writ of Assistance. See *R.* v. *Akers* (1790) 170 E.R. 850; *R.* v. *Watts* (1830) 1 B. & Ad. 176.

[21] *Cooper* v. *Boot* (1785) 4 Dougl. 343, *per* Lord Mansfield C.J. "It is a solecism to say that the regular execution of a legal warrant shall be a trespass. If improperly executed an action on the case will lie."

[22] On warrants of arrest, see *Davis* v. *Sly* (1910) 26 T.L.R. 460; *Hoye* v. *Bush* (1840) 10 L.J.M.C. 168; *Munday* v. *Stubbs* (1850) 10 C.B. 432.

[23] [1934] 2 K.B. 164.

[24] Wade, "Police Search" (1934) 50 L.Q.R. 354.

[25] *Tyler and Witt* v. *London and South-Western Ry.* (1884) Cab. & E. 285.

[26] *Leigh* v. *Cole* (1853) 6 Cox C.C. 329.

[27] *Dillon* v. *O'Brien and Davis* (1887) 16 Cox C.C. 245; *Re Borovsky & Weinbaum, ex p. Salaman* [1902] 2 K.B. 312.

The courts have not restored the original position, and, while detracting somewhat from the authority of *Elias* v. *Pasmore*, have detracted also from the right to privacy. In *Chic Fashions* the court sanctioned a new rule which it has subsequently explained, to a point, in the *Ghani* case. The rule, while no longer important in the law of theft, will be important under other statutes authorising warrants which confer rather limited powers. The facts of *Chic Fashions* are relatively simple. The police, acting on information that certain stolen clothes, the property of J. Peters Ltd., were being sold at shops owned by the plaintiff, obtained a warrant to search the plaintiff's premises for the property and seize it. The police did not find garments of the make specified in the warrant, but they did find garments of other makes of kinds which had previously been stolen. The labels had been removed and the garments were being sold at less than trade prices. These goods were seized by the police. No fresh warrant to cover them was obtained. The plaintiff sued for damages. The court, in allowing an appeal from a judgment for the plaintiff summed up the applicable principle thus[29]:

> " . . . when a constable enters a house by virtue of a search warrant for stolen goods, he may seize not only the goods which he reasonably believes to be covered by the warrant, but also any other goods which he believes on reasonable grounds to have been stolen and to be material evidence on a charge of stealing or receiving against the person in possession of them or anyone associated with him."

This decision is welcome for the statement of principle, contradicting *Elias* v. *Pasmore*, that the seizure must be justified at the time when it takes place, irrespective of the question whether the case ultimately goes to trial or not. Unfortunately, the court in *Ghani* v. *Jones* does not treat the decision as relevant in its broader aspects only to the case of stolen goods, nor does it treat it as wholly overruling *Elias* v. *Pasmore*. In *Ghani* v. *Jones* the *Chic Fashions* case is said to decide that a constable lawfully on premises is entitled to take any goods which he finds in the occupier's possession or in his house and which he reasonably believes to be material evidence in relation to the crime for which the occupier is arrested or in respect of which the constable enters. If, while searching, the constable comes upon other property which shows the occupier to be implicated in some other crime, he may, if he acts reasonably, detain such property for a limited period. These rules are said to derive from the *Chic Fashions* case and from *Pringle* v. *Bremner & Stirling*.[30] The propositions are apparently very wide. They go well beyond the early limitation that only goods described in a warrant or goods which were apt to provide evidence of goods so described could be taken. Instead, they assert a general right to take goods which the police reasonably suspect may implicate the occupier in the crime charged, whether the search is pursuant to a search warrant or incidental to an arrest. This amounts to a considerable extension of the right to search. These rules coupled with the chance discovery rule, are substantial infringements of the rights of the individual. But the rule as stated by the Court of Appeal may be wider still. For if the occupier has on his premises the property of another, and is arrested and the property found pursuant to a search shows that that other is implicated in the occupier's crime, that other's property may also be seized. This seems to be a reasonable inference from the restrictive explanation of *Elias* v. *Pasmore* which was advanced in *Ghani* v. *Jones*. What if any are the limitations on the police? Presumably, the new rules do not justify a search where no one is being arrested, whether the police enter premises as trespassers or by invitation. As will be seen, *Ghani* v. *Jones* gives the police power to detain property of evidential value obtained from a person whom they suspect of being implicated in an offence. Is the right to search to be more limited than the right to seize? The answer seemingly must be in the affirmative, for [31]:

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[28] See *Kenlin* v. *Gardiner* [1967] 2 W.L.R. 129 and a note in (1967) 28 M.L.R. 840. The like result in the case of improper searches is suggested by *Launock* v. *Brown* (1819) 2 B. & Ad. 592 which recognises the right of an occupier to resist an unlawful entry (in this case under warrant), and *R.* v. *Walsh* (1852) 7 N.B.R. 887. See also Attenborough, *op. cit.*, p. 218, who, however, cites authority which does not directly support the proposition.

[29] [1968] 1 All E.R. 229, 236.

> "The common law does not permit police officers, or anyone else, to ransack anyone's house, or to search for papers or articles therein, or to search his person simply to see if he may have committed some crime or other."

This statement of principle is, however, as regards the seizure of property from an individual, implicitly contradicted later in the judgment and it is proposed to return to this point later. At this juncture one may note that where entry is effected by warrant or pursuant to powers of arrest, the police possess the wide powers to search and seize noted above. Lord Denning M.R. states that where evidence is obtained illegally, it may be excluded from being used in evidence.[32] But this need amount to very little. For, if a constable deposes that he, having entered under warrant or power of arrest, was searching for evidence of the particular crime when he encountered evidence relevant to other offences, it will be almost impossible to show that the evidence was obtained illegally. If the police find the article for which they are searching at the outset, any further search may be unlawful, since *Pringle* v. *Bremner & Stirling* deals with a chance discovery during a valid search. This would be an example of evidence illegally obtained. On the other hand, the court may have meant that the police can conduct such a further search lawfully, if the first three of its criteria in *Ghani* v. *Jones* are met. But it is unlikely that these rules apply in the case where entry is secured under search warrant because, presumably, the police suspicion relates to the crime in respect of which the warrant is issued.

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[30] (1867) 5 MacPh. 55 (H.L.). See also *H.M.A.* v. *Hepper*, 1958 J.C. 38 which suggests that the seizure of articles discovered by chance may be lawful, or at least will not induce a Scottish court to exercise its discretion to exclude the articles as evidence.

[31] [1969] 3 All E.R. 1700, 1703, *per* Lord Denning M.R. *Entick* v. *Carrington* is cited as authority.

The result of these cases in relation to the search of premises is so far removed from the common understanding of lawyers concerning the accepted legal position, that their legal foundation is ripe for analysis. In turn such analysis tends to shed light on the extent of powers to search the person and detain property. Accordingly, it is proposed to investigate first the *Chic Fashions* case since that decision is treated as the legal foundation for the extensive power of search of premises asserted, *via dictum*, in *Ghani* v. *Jones*.

To begin with, the court in *Chic Fashions* treated the case as *res integra*.[33] This is a somewhat surprising assertion. Hitherto, relying on *Entick* v. *Carrington*, it has been assumed that search and seizure could only be justified by the existence of an affirmative rule.[34] None such appeared. Indeed, such authorities as there are, are squarely against any such contention. Thus in *Price* v. *Messenger* it is quite clearly said that a constable who finds goods which he believes to be stolen and which are not specified in the warrant commits a trespass by seizing them.[35] The same rule seems to be enunciated in other cases, both in this country and in the Commonwealth.[36] It is astonishing that Lord Denning M.R. and Salmon L.J. did not advert to this aspect of *Price* v. *Messenger* in their judgments. The treatment accorded to the decision by Diplock L.J. is no less odd. Diplock L.J. states that the case does not establish the proposition that seizure cannot be justified where the goods are not stolen. But that is not the point. The question is whether the goods seized were of a description specified in the warrant. If so, the seizure is justified even if the goods be not stolen; if not, the seizure is, according to the court in *Price* v. *Messenger*, trespassory. The rule was extended somewhat by *Crozier* v. *Cundy* as has already been indicated.[37] It was not extended further. It is true, as Lord Denning M.R. pointed out, that Lord Chelmsford L.C. in *Pringle* v. *Bremner & Stirling*[38] stated that goods other than those specified in the warrant may be seized where they tend to establish the guilt of the person in respect of whose premises the warrant was issued. According to Lord Chelmsford L.C. the search, while not justified, would have been excused. This is a slender foundation for any extension of the law. It is a dictum only, since the relevant averment of the defender was that the article seized was accidentally discovered during a search for the article specified in the warrant, while the pursuer's averment, held to disclose a cause of action, averred that the defenders ransacked his desk and drawers and that their entire search consisted of searching his books and papers. The dictum can surely only support a seizure following the chance discovery of an article. Furthermore, Lord Chelmsford's dictum is unsupported by authority. The practical application of the doctrine by Horridge J. in *Elias* v. *Pasmore* was of course discountenanced by the court in *Chic Fashions*.

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[32] [1969] 3 All E.R. 1700, 1703, relying on *King* v. *R.* [1969] 1 A.C. 304.

[33] [1968] 1 All E.R. 229, 233, *per* Lord Denning M.R.

[34] (1765) 19 St.Tr. 1029, 1066, *per* Lord Camden C.J.

[35] See the reports in 3 Esp. 46 and 2 Bos. & P. 158 which agree on this point.

[36] *Cooper* v. *Boot* (1785) 4 Dougl. 339; *Oldfield* v. *Lisot* (1775) 2 Bl.W. 1002; *Levine* v. *Stewart* [1930] V.L.R. and the very careful judgment in *Barnett & Grant* v. *Campbell* (1902) 21 N.Z.L.R. 484.

This case was, however, used as the essential link between the cases on search warrants, and those on search on arrest. It is this latter group of cases which form the real doctrinal foundation of the judgment in the *Chic Fashions* case. The *Pringle* case is said to support a proposition that goods other than those specified in the warrant may be seized where they tend to prove guilt. In the case of search on arrest, a constable may, according to *Dillon* v. *O'Brien and Davis*,[39] search and detain property found in the possession of the arrested person where this will form material evidence in his prosecution for the crime. Lord Denning M.R., in the light of the historical progression which he perceived, was content to run the two lines of authority together to arrive at the statement of principle embodied in the judgment. The historical progression is, however, far from obvious. *Dillon* v. *O'Brien and Davis* is by no means the only case on search as an incident of arrest. The historical rule, whatever may be the modern position, was that property found on the person of a prisoner could be taken from him if it was in some way material to the charge on which he was to be tried.[40] Similarly, search for and seizure of weapons was permitted where a prisoner conducted himself violently.[41] It is, however, extremely doubtful whether any wider right of seizure can be asserted.[42] The cases establishing the rule seem to have existed contemporaneously with the strict rules concerning search warrants. Diplock L.J. made an equally curious use of the *Dillon* case, holding that the right to search does not depend on the contemporaneous arrest of the person in whose possession the goods were found, nor does it depend on his later conviction. The latter proposition may be conceded. The *Dillon* case is, however, one of contemporaneous arrest. The rule appears to be that the right of search is incidental to the arrest. As Cooper J. in *Barnett & Grant* v. *Campbell* stated[43]: "The right to a personal search is clearly dependent not upon the *right* to arrest, but the *fact* of arrest." The relevance of the *Dillon* case is said to be that the right to personal liberty should stand today on the same footing as the protection of private property. Therefore, the wider rule concerning search of the person should be generally applicable. But the court seems to have misapprehended the extent of the right to search the person, and the fact that those rules were in existence at the same time as the rules relating to search warrants. In turn, this discloses another strange confusion in the judgment. It is clear that a constable who reasonably believes that a person has stolen goods or has handled them knowing them to be stolen, can arrest that person. He can also be searched. Then, Salmon L.J. asks, why are goods found on his premises to be immune from seizure?[44] Undoubtedly, not all articles on the premises are so immune. In *Dillon* v. *O'Brien* constables were held to be entitled to take property of which the accused obviously had possession, but the case plainly does not authorise a general search of the premises on which the accused is found with a view to uncovering evidence. Furthermore, the constables in *Dillon* v. *O'Brien* were only allowed to take property in the possession of the accused where it was evidence of the crime for which the arrest was made. But, under section 42 (1) of the Larceny Act 1916, as under section 26 (1) of the Theft Act 1968, a search warrant may be issued to search the premises of some person whom it is not desired to arrest. *Chic Fashions* is just such a case; the warrant was one of search only. Given this circumstance, the right to personal freedom and the protection of private property are not being equated. The foundation for the judicial syllogism is absent. The constables in *Chic Fashions* thought that the clothing might be used as evidence on a criminal charge, but they had neither arrested nor charged anyone, and were never to be in a position to do so.[45] The practice sanctioned by the court is an aspect of conduct which the courts have hitherto always forbidden: that of making a preliminary search without lawful authority in order to gather evidence before determining whether to arrest.[46]

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[37] At p. 270, note 18 above.

[38] (1867) 5 MacPh. 55, 60.

[39] See note 27 above.

[40] *R.* v. *Barnett* (1829) 3 C. & P. 610; *R.* v. *Jones* (1834) 6 C. & P. 343; *R.* v. *O'Donnell* (1835) 7 C. & P. 138.

[41] *Leigh* v. *Cole* (1853) 6 Cox C.C. 329.

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[42] A right to seize and detain anything found on the prisoner is suggested in *Re Borovsky & Weinbaum, ex p. Salaman* [1902] 2 K.B. 312 and would certainly cover anything which the police might consider could be used in evidence. It is doubtful whether the rule is any wider than this. Canadian decisions, founded upon English authority, suggest that the seizure, where it is not for the purpose of obtaining evidence or removing weapons, is trespassory. See *R.* v. *McDonald and Hunter* [1933] 1 D.L.R. 46; *Yakimishin* v. *Biliski* (1946) 86 C.C.C. 179; *Welch* v. *Gilmour and Blackstock* (1955) 111 C.C.C. 221. One of the reasons for the underdeveloped character of the law in this respect is probably s. 39 of the Magistrates' Courts Act 1952, which derives from s. 44 of the Summary Jurisdiction Act 1879. That Act enabled the court to return to an accused or to a person nominated by him articles seized by the police on arrest where the property could be returned consistently with the interests of justice and the safe custody of the accused. This did not explicitly confer any new powers on the police, but probably forestalled any further development in this area. See also *R.* v. *Lushington, ex p. Otto* [1894] 1 Q.B. 420.

[43] (1902) 21 N.Z.L.R. 484.

[44] [1968] 1 All E.R. 229, 239.

In purely doctrinal terms, *Chic Fashions* looks even more curious when it is compared with the decision of the Privy Council in *R.* v. *King*.[47] There, Jamaican legislation enabled warrants to be issued to search both persons and premises. The particular warrant was to search certain premises only and to arrest a person named therein. The appellant, who was found in the house at the time of the search was himself searched, purportedly under the authority of the warrant. The Privy Council held, however, that the search of the appellant's person was not justified by the warrant and was therefore wrongful. If the warrant was to cover the search of persons found on the premises it had explicitly so to provide. In the event, the appellant derived little comfort from this holding because the evidence, although obtained illegally, was nonetheless admitted.[48] It is, however, clear that there is a considerable asymmetry in the law if both *Chic Fashions* and *King* are to prevail.

There remains a practical reason for the judgment. The court treats cases like *Entick* v. *Carrington* with their emphasis on property rights as unsatisfactory in modern conditions. It is said that the rate of theft is rising to unprecedented levels. It is further said that if a constable who sees goods which he believes to be stolen and which are not covered by the warrant must apply for a fresh warrant, the goods will by then probably have disappeared. Stolen property may be disposed of swiftly. This justification is pertinent also to crimes like forgery and coinage offences where evidence may no doubt also rapidly disappear. In addition, it is inferred that the citizen need not be so rigidly protected from the modern police as from the Bow Street Runners. Some or all of these points may well be correct, though Jonathan Wild is not a modern phenomenon. If the matter were *res integra* their employment solely as justification for the rule might well be attractive. But the rule does, as Mr. Weir has indicated, leave the occupier to bear any loss occasioned by the conduct of the police.[49] The justice of this is by no means self-evident. The applicable rule was, at all events, a well-settled one.

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[45] According to Lord Denning M.R. at p. 237 a criminal charge was contemplated against plaintiff's or their officers, but this is belied by the statement of facts agreed between the parties (p. 232), para. 9 of the statement of defence (p. 231) and the judgment of Diplock L.J. at p. 237.

[46] *Entick* v. *Carrington* at note 16 above; *R.* v. *Boulton* (1871) 12 Cox C.C. 87 and see Weir, "Police power to seize suspicious goods" [1968] C.L.J. 193.

[47] [1968] 3 W.L.R. 391, following *Att.-Gen.* v. *Secombe* (1919) S.A.L.R. 270; see also *Davis* v. *Sly* (1910) 26 T.L.R. 460.

[48] Illegally obtained evidence is of course admissible (*Kuruma* v. *R.* [1955] A.C. 197), but there is according to the court in *Ghani* v. *Jones* a discretion, seldom exercised, to exclude it. The United States Supreme Court in a series of decisions culminating in *Mapp* v. *Ohio* 376 U.S. 643 (1961) has held such evidence to be inadmissible in both Federal and state prosecutions. For a survey of the law in England, Scotland (where the discretion to exclude is used reasonably liberally) and the Commonwealth, see Cross, *Evidence* (3rd ed. 1967), pp. 266–268.

If the balance is to swing decisively away from the right to privacy, it would be better if Parliament were the forum which changed the rule. To a marked extent this is of course taking place. Modern statutes, as has been indicated, tend to confer powers of the sort contained in the Theft Act. *Chic Fashions*, however, cannot be accepted as an accurate formulation of the accepted legal rules relating to search and seizure. *Ghani* v. *Jones* sanctions an equally sweeping departure in relation to the detention of articles taken from persons who, though the object of suspicion, have not yet been arrested. In *Ghani* v. *Jones* the police who were investigating the murder of the occupier's wife, having entered his house consensually, took the passports of the occupier and two of his relations with their reluctant consent. The persons involved then brought action for their return. The police sought to justify their action on the footing that some person would ultimately be charged with the murder and that the passports would ultimately prove to have evidential value in that connection. Lord Denning M.R. considered that the real reason for seizing the passports was to prevent the respondents from fleeing the country. In the final analysis, the respondents' claim for the return of the passports was upheld. But, in contrast to Talbot J. who at trial applied accepted legal principles,[50] the Court of Appeal sanctioned sweeping new rules concerning the power of the police to seize and detain property. The police can now exercise such powers where (1) they have reasonable grounds for believing that a serious offence has been committed, and (2) the article is either the fruit of the crime or the instrument by which the crime was committed or is material evidence to prove the commission of the crime, and (3) the police have reasonable grounds to believe that the person in possession of the property has himself committed the crime or is implicated in it, or is a party to it; or at any rate his refusal to part with it must be quite unreasonable. The police must not keep the article nor prevent its removal for longer than is reasonably necessary to complete their investigations or preserve it as evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or if it is decided not to go on with it, the article should be returned. The lawfulness of the conduct of the police must be judged at the time and not by what happens afterwards.

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[49] [1968] C.L.J. 193.

[50] [1969] 3 All E.R. 720.

Again, were the matter *res integra*, these rules, much amended, would provide a reasonable working guide for the police, though some aspects of them would require close judicial attention in the future. Their application here resulted in the return of the property since the police were unable to specify what evidential value the passports had. But the matter was not *res integra*, the reasoning by which the principles stated were reached does not correspond to the decided cases, and the extent and application of the new rules are by no means carefully worked out.

The extent to which the new rules do not correspond to the prior law has already been charted. In addition to the authorities already cited on search incident to arrest, one might also note *R.* v. *Waterfield and Lynn.*[51] There the Court of Criminal Appeal held that although the police have a duty to detect crime they must, in order to justify the seizure of property, found their actions upon some affirmative legal rule. In that case it was held that the police had no power, in the absence of a valid arrest, to prevent the accused from driving away a car which might have been of evidential value in a prosecution against him. The judgment is founded upon *Dillon* v. *O'Brien*. In *Ghani* v. *Jones*, the *Waterfield* case is distinguished in, it is submitted, an exceedingly bizarre fashion. The court first assumes the existence of a power in the police " . . . to do whatever is necessary and reasonable to preserve the evidence of the crime," whether or not there has been an arrest. The court then criticises the decision in *Waterfield* on the footing that the court in that case did not indicate what special circumstances were present to take the case out of the general rule. But of course until *Ghani* v. *Jones* no such general rule was even contemplated by English courts.[52] And in general it still remains the rule that the citizen has a right to be as unco-operative as he pleases, provided that he does not impede the course of justice by knowingly giving false information to the police.[53] It is now held that the police can detain property which may be necessary to them in the course of their investigation, even though the owner, though acting unreasonably, is in no sense a party to the offence. But when will the owner be acting unreasonably? In the case of some documents, he can no doubt be said to act unreasonably where the police are prepared to provide him with copies. In the case of other objects, which the owner needs at the time, does he act unreasonably in seeking to retain them? This sort of issue should be governed by clear and specific statutory rules, and not a vague concept of what is reasonable. In some situations, the question of what is reasonable may be obscure, and this obscurity may well be an unhappy one both for the constable who seeks to assert what he believes to be his powers and for the citizen who seeks to vindicate what he believes to be his rights. Once again, who is to suffer if a person, wholly innocent of complicity, forcibly resists the removal of his property?

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[51] [1964] 1 Q.B. 114.

[52] In *R.* v. *Williamson* [1966] 1 O.R. 8 (C.A.) the Ontario Court of Appeal held that the owners of a stolen car who drove it out of police custody at a time when the police wished to examine it for fingerprints committed the offence of obstructing the police. No authority was cited to the court which apparently assumed that the police have implied powers to do everything necessary to carry out their statutory duty under the Police Act R.S.O. 1960, C.298, s. 47 to preserve the peace, prevent crimes, and apprehend offenders. The reasoning, like that in *Ghani* v. *Jones*, is contrary to *R.* v. *Waterfield and Lynn.*

[53] *Rice* v. *Connolly* [1966] 2 Q.B. 414. It is an offence for any person by knowingly making a false report to cause the wasteful employment of the police. See the Criminal Law Act 1967, s. 5 (2). In some cases, statutory powers do compel persons to answer police questions, *e.g.* the Official Secrets Act 1920, s. 6.

A final point may be taken. Under what circumstances may the police now seize property? In an earlier portion of this paper, it was suggested that the court may have meant that search could only take place where the officers were lawfully on the premises pursuant to a search warrant or power of arrest. Is the right to seize wider? In *Ghani* v. *Jones* the officers entered with the consent of the occupier who, overborne by moral suasion, surrendered the documents. The earlier reference to *Entick* v. *Carrington* notwithstanding, the final statement of principle in *Ghani* v. *Jones* does not limit the police in respect of the circumstances under which they can seize property. May the police conduct a " common-law " stop and search of the citizen on the street or in his home? May they enter his vehicle without a warrant or statutory power? Commonwealth decisions, at least, hold the contrary.[54] Is the position then, that while forbidden to use physical force against a person not yet arrested, the police are allowed, or even encouraged, to secure entry to premises, to obtain documents, and to obtain permission to search by recourse to moral blackmail? The court in *Ghani* v. *Jones* allowed the respondents to sue because they had not truly consented to the initial taking or the continued detention of the passports. But it is doubtful whether the respondents would have succeeded had the evidentiary value of the passports or the suspicions against the respondents been articulated clearly. But if this is right, the limitations to police power in respect of the mode and circumstances of seizure become unhappily obscure. Ought, after all, moral force and physical force to be differentiated for this purpose, and if so, on what ground other than that of expediency?

There is something repellent in a judgment which, purporting to uphold the risks relating to the freedom of the individual, nonetheless appears to connive at trespass and overbearing conduct by police officers. And it is perhaps unwise to stress as a means of controlling the police an exclusionary rule of evidence which disciplines the item at the potential cost of acquitting manifestly guilty offenders. But *Ghani* v. *Jones* also underlines the necessity of enacting comprehensive warrant provisions which will avail the police in all cases of serious crimes.[55] It draws attention also to the need for rules enabling the police to detain property required for evidential purposes, a problem which is not often adverted to. It is also apparent that attention should be devoted to the circumstances under which such powers may be exercised, and the limits of police powers to detain property. These are matters which cannot be left to the slow and cumbersome process of judicial decision. They must be dealt with by legislation. Some of the problems in this area of criminal procedure are now becoming evident. It is hoped that the Law Commission will, in part of its Criminal Code programme, tackle them expeditiously. The present position in which novel powers may be exercised, based upon a decision which may well not prove to be unimpeachable if the issues reach the House of Lords, is satisfactory neither to the police nor to the public.

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[54] See *Blundell* v. *Att.-Gen.* [1968] N.Z.L.R. 341, and on the standard of proof in search warrant cases, *Seven Seas Publishing Company* v. *Sullivan and Others* [1968] N.Z.L.R. 66.

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[55] Such powers exist, for example, in Canada. See Criminal Code 1954, s. 431.

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ADVERSE POSSESSION OF LAND— MORALITY AND MOTIVE[1]

THE doctrine permitting acquisition of title to land by adverse possession has been said to be "an ailing concept."[2] Recent cases have tended to confine its operation.[3] Now is probably the time to ask starkly two questions: (1) Has "squatter's title" to land, with its undertones of "land-stealing," any place in a civilised society, particularly a society committed ultimately to universal state registration of title to land? (2) If, as will be submitted, "squatter's title" can still perform a useful, indeed a necessary, function, ought it to require that the "squatter" should have a particular intention or motive before allowing him to acquire title? This article attempts to answer these two questions.

1. THE MORALITY OF ADVERSE POSSESSION

What, then, is the proper function of acquisition of title by adverse possession for the statutory period?[4] Roman law recognised the concept in the forms of *usucapio* and *longi temporis praescriptio*. However, there were normally required bona fides and *justa causa* in addition.[5] In English law, the concept was an integral part of the doctrine of ownership by seisin and, even today, our system of land registration allows for the acquisition of squatter's title to registered land.[6] An authoritative view is that of Curtis and Ruoff when they say[7]:

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[1] Parts of this article are based on the author's Ph.D. thesis on *Adverse possession of land in the law of Limitation of Actions* and are published by kind permission of the Manchester University Librarian.

[2] J. C. W. Wylie, "Adverse Possession: An Ailing Concept?" (1965) 16 N.I.L.Q. 467.

[3] See, *e.g.*, *Fairweather* v. *St. Marylebone Property Co. Ltd.* [1963] A.C. 510 and *Tickner* v. *Buzzacott* [1965] Ch. 426, rendering precarious a leasehold title acquired by adverse possession; *Geo. Wimpey & Co. Ltd.* v. *Sohn* [1967] Ch. 487 and *Hughes* v. *Griffin* [1969] 1 W.L.R. 23, refusing to recognise long possession as adverse.

[4] Usually 12 years—Limitation Act 1939, s. 4—though longer periods are required to acquire land belonging to the Crown, certain corporations sole, owners of future interests, and persons under a disability: 1939 Act, ss. 4, 6 and 26.

[5] These requirements are discussed *infra* p. 283.

[6] It is noteworthy that the original prohibition of acquisition of title to registered land by adverse possession (Land Transfer Act 1875, s. 21, *cf.* Land Transfer Act 1897, s. 12) has been superseded by allowing such acquisition and giving the rights, inchoate or perfected, of a squatter on registered land the status of an "overriding interest," so that they prevail against a purchaser, even with no notice of them, as is indeed the case with unregistered land—see now Land Registration Act 1925, ss. 70 (1) (*f*) and 75.

[7] Curtis and Ruoff, *Registered Conveyancing* (2nd ed., 1965), p. 121.

> " Misunderstandings have sometimes arisen from an unwarrantable belief that title deeds are sacrosanct documents, whereas the truth is that neither a conveyance nor a land certificate retains its value if the landowner is so lax or so indifferent as to lose physical control of his land."

Indeed, a distinguished Law Reform Committee recently said of title by adverse possession that[8] " certainty of title to land is a social need and occupation of land which has long been unchallenged should not be disturbed." It is significant that the Theft Act 1968 does not, in its provisions creating for the first time a criminal offence of theft of land,[9] impinge on the ordinary case of acquiring land by adverse possession, even by deliberate " land-stealing."

Yet many systems of land registration in the Commonwealth[10] expressly negative the acquisition of title to registered land by adverse possession, deliberately excluding the wise decision of the Privy Council in *Belize Estate and Produce Co.* v. *Quilter*[11] that a squatter could extinguish the title of a registered proprietor even where the statute of land registration provided that the registered proprietor should be entitled " to the exclusion of all other persons and of all other estates, interests, powers, and rights."

Yet one hears rumblings of discontent. Recently, in the celebrated case of the Nottinghamshire rector's claim to parishioners' land by adverse possession, *Hayward* v. *Chaloner*,[12] the Court of Appeal expressed themselves disapprovingly of the claim in that particular case and Lord Denning M.R. said of a failure to collect rent from the rector resulting in his acquiring the fee simple, " All I would say is that, if the law does penalise good nature in this way, the sooner it is changed the better." [13]

The real burden of the criticism in that case, however, seems to have been that the existing law does not import the general principle that possession should be " adverse " [14] into the particular case of a tenant who, by not paying rent, bars his landlord's reversion.[15]

It is nevertheless submitted that the doctrine of adverse possession has still a considerable and beneficial part to play in curing inadvertent defects in unregistered titles, and in making the title to land follow the physical occupation or the actual boundaries, rather than divorcing the "paper title" from reality. The continued recognition of squatters' titles, however, is a strong measure, savouring as it does of remedies of "self-help," and the way to regulate that strength is carefully to define what is meant by *adverse* in the phrase "adverse possession."

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[8] Law Reform Committee's 14th Report (on acquisition of easements and profits by prescription), Cmnd. 3100, p. 12, para. 36; *cf.* p. 13, para. 38 (*d*).

[9] Theft Act 1968, s. 4.

[10] *e.g.* New South Wales, New Zealand, British Columbia, but *contra* Alberta (see article, " Title by Limitation in a registered conveyancing system " by J. S. Williams (1968) 6 Alb.L.Rev. 67).

[11] [1897] A.C. 367.

[12] [1968] 1 Q.B. 107. See (1968) 31 M.L.R. 82.

[13] *Ibid.* at pp. 119–120.

[14] Limitation Act 1939, s. 10 (1).

[15] *Ibid.* at pp. 122–123. See *infra* pp. 283–286 for a discussion of the meaning of "adverse." The real difficulty in *Hayward* v. *Chaloner* would have seemed, however, to have been the general rule that time runs against a potential plaintiff, even though he is unaware it is running—*cf. Howell* v. *Young* (1826) 5 B. & C. 259.

THE MOTIVE IN ADVERSE POSSESSION

Roman law

It is at this point that we must try to answer our second question, namely, ought the law to require the squatter to have a particular intention or motive before allowing him to acquire title? Roman law was strict on this point, requiring (i) that possession of the land should in the first instance have been taken bona fide (so that forceful "land-stealing" could never give a squatter's title) and (ii) that there should have been a *justa causa* for the taking of possession, namely, a purchase or taking by way of gift from someone wrongly believed to be the true owner or by a method of transfer mistakenly believed to be effective.[16] The original taker of the land, even if non-violently, could not acquire a "squatter's title" for he was not bona fide, knowing the land not to be his own, but a purchaser from him who had *justa causa* could acquire title.[17]

Present common law

English law theoretically knows no such inhibitions. It is true that there is statutory insistence on the possession being "adverse,"[18] but there is authority that this adds nothing to the earlier limitation statutes[19] on which James L.J. once remarked,[20]

> "It must always be borne in mind that in all such questions under the Statute of Limitations this Court has nothing to do with the nature, origin, or duration of the Defendant's possession, but simply whether or not the Plaintiff has or has not proceeded in due time after the accruer . . . of his right of suit."

Indeed, it is distinctly possible that English law is the exact opposite of Roman law. Deliberate land-stealing, even by forceful eviction, can in English law give rise to *adverse* possession whereas possession taken bona fide and with a *justa causa* may well not be "adverse." Certainly in some jurisdictions in the U.S.A. it has been held that long-continued possession of land taken by mistake, *e.g.*, as to the whereabouts of a boundary, does not confer a squatter's title, as when a claimant testified, "Occupied it on account I thought it was my own land."[21]

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[16] See, *e.g.* Inst. II.6.

[17] *Ibid.* para. 7.

[18] Limitation Act 1939, s. 10 (1).

[19] Real Property Limitation Acts 1833 and 1874; See *Moses* v. *Lovegrove* [1952] 2 Q.B. 533, 539 (*per* Evershed M.R.).

[20] *Vane* v. *Vane* (1873) L.R. 8 Ch. 383, 397.

Underlying this attitude is the idea that a "mere squatter" who asserts no title to the land cannot be entitled to the benefits of adverse possession for he did not claim them. In the American case of *Ricard* v. *Williams*,[22] for example, Story J. said, "If the party claim only a limited estate and not a fee, the law will not, contrary to his intentions, enlarge it into a fee" and he held, in accordance with this dictum, that possession under a lease for 1,500 years that was in fact void could not ripen into a fee simple.[23]

The Privy Council, in hearing an appeal from Ceylon depending on a requirement of a Ceylonese Ordinance that long possession of land, to bar the owner's title, must be "adverse to and independent of" the owner, felt itself bound to consider evidence of the character of a long possessor as being that of a "plunderer," "convicted forger" and "thief" to decide whether or not he was, in an ambiguous situation, likely to have taken possession adversely or not.[24] Moreover, in the leading Court of Appeal case of *Williams Brothers Direct Supply Co. Ltd.* v. *Raftery*,[25] a claimant to a piece of garden ground who objectively appeared to have done everything possible to take possession of the land, by cultivating it[26] and fencing off part of it, was held nevertheless not to have acquired squatter's title to it because (*inter alia*), "he never . . . had any intention, nor claimed any intention, of asserting any right to possession."[27] Yet the only evidence of this lack of intention to possess adversely was the claimant's admission, in cross-examination, "I knew other tenants were cultivating behind their premises. I thought entitled to same. Not trying to take over land, not really. Exercising rights I thought I had as tenant of these premises."[28]

In the recent Court of Appeal case of *Hughes* v. *Griffin*[29] there occurred the same problem of whether the motives of a long possessor were relevant to a claim to title by adverse possession. A husband had conveyed the matrimonial home to his nephew but continued to live with his wife in the house for more than twelve years thereafter. After his death, his widow claimed that her late husband had acquired by adverse possession a fee simple in the house and had barred the nephew's "paper title." The evidence showed that throughout the period the husband retained possession by a licence from the nephew that was not revoked. The husband had on several occasions expressly acknowledged that he wished to possess merely by virtue of the nephew's permission and so on the facts the widow's claim therefore rightly failed.[30]

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[21] *Preble* v. *Met. Cent. Ry.* (1893) 85 Me. 260.

[22] 20 U.S. 59 (1822), 5 L.Ed. 398.

[23] *Cf.* the English rule that possession taken under a void lease can confer a fee simple by adverse possession—*Magdalen Hospital* v. *Knotts* (1879) 4 App.Cas. 324 (H.L.).

[24] *Corea* v. *Appuhamy* [1912] A.C. 230, 236.

[25] [1958] 1 Q.B. 159 (C.A.).

[26] "This claimant did not go on to the land to assert his possession but merely 'to dig for victory.'"!—*per* counsel *arguendo*, *ibid.* at p. 164.

[27] *Ibid.* at p. 169 (*per* Hodson L.J.).

[28] *Ibid.* at p. 162. He was not a tenant of the landowner whose title he claimed to have extinguished, but a sub-tenant of a mesne landlord. The technical doctrine of tenants' encroachments (see p. 288, *infra*) did not therefore apply.

[29] [1969] 1 W.L.R. 23.

However, Harman L.J. uttered some dicta on a suggested principle that the intention of the squatter is immaterial. The learned Lord Justice said,[31]

> "It would be to my mind contrary to common sense to suppose that 'maugre ses dents' (to use the old phrase) a man can become an owner under the Limitation Act when his whole intention was not to become such an owner. I would make a citation from Lord Greene in *Booker* v. *Palmer* [1942] 2 All E.R. 674 in which he said this at p. 677:
>
> 'There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind'."

It is respectfully suggested, however, that the intention or motive of a long possessor ought to be irrelevant. The passage cited by Harman L.J. from *Booker* v. *Palmer* is in fact preceded by these words,[32]

> "Where the parties enter into a formal document the intention to enter into formal legal relationship is obvious; but when all that happens is a quite casual conversation on the telephone, it is very much more difficult to infer that the parties are really contemplating entering into any legal relationship at all. . . ."

This seems to be more appropriate to the negation of intention to create legal relations, the *Balfour* v. *Balfour*[33] type of case, than to the technical question of what is meant by "*adverse* possession."

If, in fact, an intention to claim adversely is required, why should the widower claimant in *Doe* d. *Miller* v. *Brightwen*[34] have failed when he took possession of his deceased wife's land intending to possess as fee simple owner, but unfortunately chanced to be a tenant by the curtesy, a fact that he did not realise until the court adjudicated it to be so on a minute point relating to admittance to copyholds? Indeed, in another case in 1957 Harman J. (as he then was) felt impelled to interject incredulously during argument, "You are worse off when you enter lawfully " and counsel felt constrained to reply, " Yes often; the case is by no means as startling as it sounds, because one has a comparable situation in detinue." [35]

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[30] For the possibility of possession taken initially under a licence becoming subsequently adverse, see (1966) 30 Conv.(N.S.) 106 and *cf. Healey* v. *Hawkins* [1968] 1 W.L.R. 1967 (prescriptive right of way originating in licence).

[31] [1969] 1 W.L.R. 23, 28.

[32] [1942] 2 All E.R. 674, 677. The case concerned the distinction between a tenancy and a licence.

[33] [1919] 2 K.B. 571.

[34] (1809) 10 East 583.

Suggested meaning of " adverse "

A more satisfactory solution of the problem would, it is submitted, be to *presume* that long-continued possession is adverse to the owner of the land, the presumption to be rebuttable only by proof that the possession derived from and has been continued solely under the terms of a subsisting lease or tenancy, licence, trust, agency, easement or profit.[36] There is authority that in at least one type of adverse possession, this already represents English law. This is where land is leased,[37] when the Limitation Act 1939 provides that adverse possession can be taken by a person who receives the rent, ". . . *wrongfully* claiming to be entitled to the land in reversion immediately expectant on the determination of the lease." [38]

On this very wording in the statutory predecessor of the 1939 Act,[39] Lord Romilly M.R. held in *Williams* v. *Pott* [40] that a receipt of rent, under the mistaken belief by the recipient that she was entitled to the land under a devise in a will,[41] was nevertheless a receipt by a person " *wrongfully* claiming to be entitled." The short judgment of Lord Romilly M.R. clearly disposes of the subjective view of what is adverse possession in this context. He said,[42]

> " The argument that the word ' wrongfully ' excludes the receipt by mistake, or any other matters of that description, and must mean an intentional and improper claiming of the rent I reject altogether; and I am satisfied that it is not the true construction of the statute. It means a person not entitled, who makes a claim to the rents against the person who is entitled."

The case is an excellent illustration of the principle that possession taken by mistake ought to be adverse. The recipient of the rents had collected them through an agent who mistakenly did not realise that, under a settlement, he was himself beneficially entitled to the land. He had, therefore, in a sense extinguished his own title, but only because his possession of the rents was solely as agent for his principal and because he never repudiated his agency.

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[35] *Bridges* v. *Mees* [1957] 1 Ch. 475, 481.

[36] As to the application of this test to possession allegedly referable to an easement or profit, see the author's article in (1968) 32 Conv.(N.S.) 270.

[37] In writing, for an annual rent of not less than £1 per annum—Limitation Act 1939, s. 9 (3).

[38] Limitation Act 1939, s. 9 (3). Italics supplied.

[39] Real Property Limitation Act 1833, s. 9.

[40] (1871) L.R. 12 Eq. 149; *cf. Bligh* v. *Martin* [1968] 1 W.L.R. 804 and *Hayward* v. *Chaloner* [1968] 1 Q.B. 107.

[41] The land was not in fact devisable by the testator.

[42] (1871) L.R. 12 Eq. 149, 152.

Possession taken by mistake

It is suggested that the principle of the case should be extended to all situations in which title by adverse possession is claimed. A formulation of the principle would be that possession should be adverse when taken under the mistaken belief that the right to possession was conferred by an instrument or transaction which in fact conferred no such right (as distinct from a voidable right [43]), for the reason again that the actual belief or intention of the possessor is irrelevant. Such a general rule would have the beneficent effect of making the title follow the physical boundaries where for twelve years or more a landowner had acted under a mistaken belief as to the land comprised in a conveyance to him,[44] a common occurrence, for example, where a builder develops a housing estate differently from the estate plan. It would not always be possible to rely on estoppel to settle the boundary, as happened in *Hopgood* v. *Brown*,[45] since that case depended on an actual representation by the owner encroached upon that the boundary was correct. Such a representation would be a comparative rarity.

The application of this suggested rule would not be confined to boundary disputes. It would cure many current conveyancing ills, for example the case of the missing assent by a personal representative to himself,[46] or of a failure to take out a grant of representation to a deceased's estate.[47] The malady of a long-forgotten right of reverter to a closed school site can be overcome,[48] as can an *ultra vires* conveyance by a corporation or charity.[49] Failure, on a dealing with settled land or land subject to a trust for sale, to comply with the requirements of the legislation of 1925 may after twelve or more years no longer be as fatal as it was in *Weston* v.

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[43] *e.g.* transactions affected by infancy, duress, undue influence, fraud or breach of fiduciary duty. The remedy of avoidance of the transaction may be lost by expiry of time (*e.g.* by laches) but this will merely confirm the transaction as valid and not confer a squatter's title independently of the instrument, *e.g.* 12 years' possession taken under a voidable lease for 21 years would not confer a fee simple but would confirm the leasehold estate of 21 years—*contra* Court of Appeal in *Magdalen Hospital* v. *Knotts* (1878) 8 Ch.D. 709 but point left open in the House of Lords—(1879) 4 App.Cas. 324.

[44] *Cf.* the American case of *Preble* v. *Me. Cent. Ry.* (1893) 85 Me. 260, *supra*, p. 2, and *Doe* d. *Taylor* v. *Sexton* (1851) 8 U.C.R. 264 (Canada—possession under mistake of boundary is adverse).

[45] [1955] 1 W.L.R. 213 (C.A.).

[46] See *Re King's Will Trusts* [1964] Ch. 542 and Farrand, *Contract and Conveyance* (1968), p. 99; *quaere* whether a sole personal representative-cum-beneficiary or cum-trustee could possess adversely to himself?

[47] A common method of making title to the family farm in Ireland. *Cf. Williams* v. *Pott* (1871) L.R. 12 Eq. 149; *Paine* v. *Jones* (1874) L.R. 18 Eq. 320.

[48] See School Sites Act 1841, s. 2, and *Re Ingleton Charity* [1956] Ch. 585, 590. (The decision in this case that the site, though acquired by adverse possession, was still held on educational trusts seems open to criticism. *Cf. Churcher* v. *Martin* (1889) 42 Ch.D. 312 and *Paine* v. *Jones* (1874) L.R. 18 Eq. 320.)

[49] See *Re Woking Urban Council (Basingstoke Canal) Act 1911* [1914] 1 Ch. 300 (C.A.) and *Mayor of Brighton* v. *Guardians of Brighton* (1880) 5 C.P.D. 368.

Henshaw,[50] where a bona fide mortgagee of land without notice of its being subject to a strict settlement nevertheless obtained no title.

The antiquated doctrine that a tenant who encroaches on land near to the demised land encroaches on behalf of his landlord and does not acquire title to it for himself [51] seems inconsistent with the suggested rule that possession taken under a mistake as to the effect of a transaction (here the original lease or tenancy) should be presumed adverse. Why should a tenant of a house under, say, a ninety-nine-year lease who encloses and cultivates for twelve years an adjoining field belonging to his landlord not acquire a fee simple estate in that field? If he had bought the fee simple in the house he could have acquired a fee simple in his vendor's adjoining field. The solution of this apparent anomaly would seem to be that the land encroached on should after twelve years belong absolutely to the tenant unless there is clear evidence that, (i) where the land encroached on belongs to a third party, the tenant encroached as express agent for the landlord or, (ii) where the land encroached on belongs to the landlord, that the tenant encroached under an express consent from the landlord, amounting to a licence or a contractual variation of the original tenancy.

CONCLUSION

The answers to our two questions would seem, therefore, to be:

(1) Acquisition of title by adverse possession is not immoral and can have a benign influence on the social policy that security should be given to the long possessor of land.

(2) The motive, intention or belief of the allegedly adverse possessor is immaterial. The deliberate evicter and the mistaken encroacher should both be able to acquire title. Long-continued possession should *ipso facto* confer title unless it is proved that that possession began and continued under a valid transaction with the true owner, *i.e.* that the possession was purely derivative.

MICHAEL J. GOODMAN.*

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[50] [1950] Ch. 510. It is to be hoped that the court would not refer the title of the purchaser under a void conveyance of settled land to the assignment of the life-tenant's equitable interest which the purchaser may take by virtue of the Settled Land Act 1925, s. 18 (1) (*a*).

[51] See *e.g.* *Kingsmill* v. *Millard* (1855) 11 Exch. 313; *Lisburne* v. *Davies* (1866) L.R. 1 C.P. 259; *Whitmore* v. *Humphries* (1871) L.R. 7 C.P. 1; *Perrott* v. *Cohen* [1951] 1 K.B. 705; *King* v. *Smith* [1951] 1 All E.R. 553.

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A NEW APPROACH TO THE CONTROL OF OBSCENITY

AT Leeds Assizes in February 1969 a publisher and printer was sentenced to two years' imprisonment and heavily fined for publishing the Victorian classic *My Secret Life* by "Walter" and for possessing for gain a book already returned to him by the police on the instructions of the Director of Public Prosecutions.[1] But as Mr. C. H. Rolph has recently written: "Prison is not the place—whoever else may be justifiably there—for someone who has done no more than publish a book."[2] Mr. Rolph suggests the abolition of the criminal offence of publishing an obscene article, to be replaced by proceedings for forfeiture only, as under section 3 of the Obscene Publications Act 1959. This would certainly be an improvement, but not a particularly satisfactory one.

Writing on the control of obscenity in 1965, Mr. David Williams thought the only possible alternative to the criminal prosecution was a system of prior censorship of some sort. This he rightly rejected since pre-censorship has, on the whole, been for long discredited, although it survives in the case of the cinema and has only recently been abolished in the theatre. "The present position of the law then," concluded Mr. Williams, "though haphazardly reached, is not capable of substantial change at this time."[3] It is here that I cannot agree. Aghast at a law which sends publishers to prison or subjects them to enormous fines, Mr. Alan Watkins, a journalist, recently wrote: "One solution would be for the law to be altered so that proceedings *in rem* could be taken against a book."[4] Mr. Watkins fortuitously proposed a system—it has been termed "subsequent restraint"—which operates in a number of American states and which seems preferable to the ordinary criminal proceedings we have here.

This article, then, presupposes the existence of legislation suppressing obscene material—legislation which is likely to continue for some time yet[5]—and suggests a means of implementing this control without having to subject publishers to the rigours of the normal processes of the criminal law.

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[1] In November 1969—after serving ten months of his sentence—the publisher appealed successfully: *The Sunday Times*, December 7, 1969.

[2] *Books in the Dock* (London, 1969), p. 180.

[3] "The Control of Obscenity—II" [1965] Crim.L.R. 522, 531.

[4] "A Slight Case of Obscenity," *New Statesman*, February 14, 1969, p. 210.

[5] In *The Obscenity Laws* (London, 1969), an Arts Council working party recommended the abolition of all obscenity legislation, but the Home Secretary has rejected this recommendation. He has, however, admitted that the law is in need of reform and is prepared to co-operate in trying to put it right: H.C. Deb., Vol. 793, cols. 1588–1589 (December 18, 1969).

DEFECTS IN THE EXISTING MACHINERY

However hard judges and legislators have tried to define obscenity with any precision, it remains necessarily vague and uncertain—the more so since the Divisional Court's judgment in *John Calder (Publications) Ltd.* v. *Powell*.[6] It remains an offence which can even be committed unwittingly, and this offends against one of the cardinal principles of the criminal law that it should always be possible to ascertain in advance with some degree of certainty that the conduct which is contemplated is unlawful. Otherwise, punishment is being imposed when the offender could reasonably have believed that he was not breaking the law, and this assumes the character of an *ex post facto* sanction.[7]

Nor can there be much satisfaction in seeing reputable publishers hauled into the courts. This, and the imposition of a penal sanction (and, of course, the registering of a criminal conviction), is painful and ludicrous. It is not in the least helpful to castigate people as criminals who by no stretch of the imagination conform to the customary notions of criminality. That in fact does a severe disservice to the law by enervating the condemnation in which truly criminal conduct should be held. Of itself it accomplishes nothing which the new system proposed below would not succeed in doing. As an apology for this, it has become customary, when a "reputable" publisher is being tried, for the trial judge to invite the defendant to leave the dock and join his solicitor at the table.[8]

Lastly, the present system is deficient in that there is no universal finding that a book is obscene. Any determination of obscenity applies only to the particular magisterial jurisdiction or to the particular act of publication: it does not attach to the work in question wherever and by whomever it is published, and that is a weakness in the law. All three of these defects can be overcome.

ORIGINS OF THE PROPOSAL

So much criticism was aroused in Boston in the 1920s as a result of unofficial blacklists of books and warnings from persons without legal authority[9] that booksellers themselves drafted legislation providing for injunctions to be issued against books held to be obscene.[10] It was not until 1945 that the system was enacted by the Massachusetts legislature and the proposed injunction was replaced by a declaratory judgment.[11] The ordinary criminal action was, however, to continue as an alternative. When it was first introduced, a judge of the Supreme Judicial Court of Massachusetts welcomed the legislation. "This statute," he said, "should go far to remedy complaints that the present law has operated unjustly in that sales people or clerks in stores may be convicted for selling a book when the seller does not know and perhaps as a practical matter cannot know whether or not he is violating the law." [12] And the same will often be true of the publisher, too.

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[6] [1965] 1 Q.B. 509; [1965] Crim.L.R. 111.

[7] See *The Obscenity Laws*, pp. 30–31 and 35–36.

[8] A Law Society memorandum in 1966 to the Home Secretary, *The Use of the Dock in Criminal Courts*, recommended the abolition of the dock, at least for an experimental period.

[9] In *American Mercury* v. *Chase*, 13 F 2d 224 (1926), A Federal District Court issued an injunction to restrain private individuals from threatening booksellers with criminal proceedings if they refused to withdraw books alleged to be obscene.

[10] See Chafee, *The Inquiring Mind* (1928), p. 140, and *Free Speech in the United States* (1941), pp. 538–540.

The purpose of the Massachusetts statute is simple: instead of putting the publisher or distributor of an allegedly obscene book on trial, it puts on trial the book itself in a civil equity suit brought by the State Attorney-General or any district attorney. If a judge of the Superior Court holds that there is reasonable cause to believe that the book is obscene, he issues an order, returnable in thirty days, addressed to all interested parties—including the publisher and author—requiring them to show cause why the book should not be declared obscene. Meanwhile, if the court is asked for an interlocutory adjudication that the book is obscene, it must make such an order pending the making of the final adjudication.[13] The court may declare the book obscene without trial if the proceedings are not resisted within the thirty-day period.[14] A judgment declaring the book obscene provides no coercive relief, but in a trial on indictment for publishing obscene matter contrary to section 22B, the order is admissible in evidence, and the defendant "shall be conclusively presumed to have known said book to be obscene, indecent or impure, or if said decree had been in favour of the book he shall be conclusively presumed not to have known said book to be obscene, indecent or impure." [15] It is difficult to see why it is thought necessary to continue with the ordinary criminal procedure under section 22B: it would seem much simpler to invest the equity decree with greater power. Thus, if it condemned the book, all copies would be forfeited; and any violation of the order would be an offence created by statute or otherwise simply punishable as contempt of court. Under an amendment of 1948, no adjudication is necessary in order to sustain a conviction for selling obscene matter to minors under eighteen.[16] The statute makes no reference to appeals but leaves it to the normal procedure in *civil* cases, so that either party may appeal to the State Supreme Court.

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[11] Mass.Gen. Laws Ann., c. 272, ss. 28C–28H; noted at (1946) 59 Harv.L.R. 813.

[12] In *Cw.* v. *Isenstadt*, 62 N.E.2d 840, 849–850 (1945), *per* Qua J. However, since the U.S. Supreme Court's decision in *Smith* v. *California*, 361 U.S. 147 (1959), *scienter* is now a necessary ingredient of the offence; so a bookseller must be shown to have had knowledge of the books he was selling.

[13] s. 28C.

[14] s. 28E.

[15] s. 28H.

[16] Mass. Acts 1948, c. 328.

"The central feature of this statute," wrote Professor Zechariah Chafee, who was the foremost authority on this subject in the United States, "is that it permits an advance decision on the indecency of a book, without obliging anybody to commit a possible crime and run the risk of punishment. . . . This Massachusetts law deserves nation-wide attention. It seems to me the best method yet devised for drawing the line between decent and indecent books." [17] Several other states have drafted legislation along these lines, including Arkansas, Florida, Michigan, New York and Wisconsin.[18] The New York legislation was held constitutional by the United States Supreme Court in *Kingsley Books Inc.* v. *Brown*,[19] when Frankfurter J. said: "Instead of requiring the bookseller to dread that the offer for sale of a book may without prior warning subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order. . . ." Again, the same will be true of the publisher.

ADVANTAGES OF THIS SYSTEM

So no publisher or bookseller is forced to risk criminal penalties in going about his business, and reputable publishers, like Sir Allen Lane of Penguin Books and Mr. John Calder of Calder and Boyars, are not made the subjects of trials at the Old Bailey, for it is then the whole machinery of the law which looks foolish.

More importantly, such a finding of a court would be of universal application, whereas now particular defendants must be prosecuted for each publication (under the Obscene Publication Act 1959) or each possession of an obscene article for publication for gain (under the Obscene Publications Act 1964); and the conclusion of one bench of magistrates ordering forfeiture (under the 1959 Act) has force only within that court's jurisdiction. It is irrelevant that the Marlborough Street magistrate has declared *Last Exit to Brooklyn* obscene, or that other magistrates have banned *Fanny Hill*. If anyone else were to publish these books, no action could follow without a completely new trial having to take place. If, however, an order of the court declaring a book obscene or vindicating it were in force, no further proceedings on the question of that book's obscenity would be necessary or possible. Only if an order had been contravened would any proceedings take place.

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[17] *Government and Mass Communications* (A report from the Commission on Freedom of the Press) (Chicago, 1947), Vol. 1, p. 229.

[18] Ark.Stats.Ann. ss. 41-2713 to 41-2728 (1964); Fla.Stat.Ann. s. 847.011(7) (Supp. 1961); Mich.Stat.Ann. s. 27A.2938 (1961); N.Y. Code of Crim.Proc. s. 22 (a): see Murray, "Statutory Innovation in the Obscenity Field" (1957) 6 Buffalo L.R. 305; Wis.Stat.Ann. s. 269.565 (Supp. 1962): see Note [1960] Wisconsin L.R. 309. And see also, J. P. Morreale, "Obscenity: An Analysis and Statutory Proposal" [1969] Wisconsin L.R. 421 at p. 457 *et seq.*

[19] 354 U.S. 436, 442 (1957).

This is more a problem in the United States with its many jurisdictions than here. There different courts often reach opposing conclusions on the same book. *Fanny Hill*, for example, was condemned by the Massachusetts Supreme Judicial Court [20] but cleared by the New York Court of Appeals [21]; *Tropic of Cancer* was condemned in New York [22] yet cleared in Massachusetts [23]; and when the two most prestigious state courts cannot agree, the nature of the problem is apparent. Ultimately, both books were found not obscene by the Supreme Court.[24] Similar absurdities can even arise within the same jurisdiction. In Boston some years ago, one person was acquitted for selling an issue of the *American Mercury*, while shortly afterwards a different judge convicted a dealer for disposing of the same magazine.[25] It is right that once a book has been found obscene, it should be unlawful for anyone to publish it, and this should be possible without having to resort to complicated, lengthy and costly trials. Equally, when a book has been found not to be obscene, there should be no risk at all involved in publishing. "No doubt some decisions will still meet with considerable disapproval," commented Professor Chafee, "but this is inevitable if we are to have obscenity laws at all." [26]

It is the purpose of the law to suppress books which are thought to be harmful: its purpose is not to be gratuitously spiteful. And since it should be compulsory for proceedings to be defended (see below), the purveyor of hard-core pornography will be adequately penalised by the substantial legal costs he will have to bear. The law is thus being preventive rather than punitive; and as Blackstone said: ". . . *preventive* justice is upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice." [27] It is for these reasons that this proposal is made as being an improvement on the present crude procedure. But certain problems do arise and modifications of the American pattern are desirable.

MODIFICATIONS NECESSARY FOR ENGLAND

The Massachusetts procedure is entirely civil.[28] This has its disadvantages and it is suggested that the system here should be grafted onto the criminal law. This way the defendant would be protected:

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[20] *Attorney-General* v. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure,"* 206 N.E. 2d 403 (1965).

[21] *Larkin* v. *G. P. Putnam's Sons*, 200 N.E. 2d. 760 (1964).

[22] *People* v. *Fritch*, 192 N.E. 2d 713 (1963).

[23] *Attorney-General* v. *A Book Named "Tropic of Cancer,"* 184 N.E. 2d 328 (1962).

[24] *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney-General of Mass.*, 383 U.S. 413 (1966); *Grove Press Inc.* v. *Gerstein*, 378 U.S. 577 (1964).

[25] See Chafee, *The Inquiring Mind*, p. 187.

[26] *Government and Mass Communications*, Vol. 1, p. 281.

[27] 4 Bl.Comm. 251.

[28] Condemnatory proceedings under s. 44 of the Customs and Excise Act 1952 are civil.

the Crown could not appeal; the quantum of proof would be according to the stricter standards of the criminal courts; and violation of a decree could be made a substantive offence.

As in Massachusetts it is wise for a decree to be made either way, so that a book found not to be obscene would be immune from all further proceedings. Theoretically, a prosecution could be launched tomorrow against anyone daring to publish *Lady Chatterley's Lover* or *Last Exit to Brooklyn*, although both books have been vindicated by courts. But unlike Massachusetts it might be better if the court expressed no preliminary opinion that there was reasonable cause to believe the book was obscene, since this could prejudice a jury, if one were used (see below). So long as proceedings could be initiated only by the Attorney-General or the Director of Public Prosecutions there is no reason to fear that the procedure would be open to abuse.

SOME PROBLEMS TO BE OVERCOME

The Massachusetts legislation is confined to books and this Professor Chafee has criticised, because periodicals and pamphlets "are equally important instrumentalities for the communication of information and ideas." [29] But owing to the ease, cheapness and frequency with which these can be and are produced, it might be more sensible not to bring them within the scope of this new procedure. Moreover, it is only books which—with notable exceptions, perhaps—are really likely to be serious literature and therefore deserving of a more careful and sensitive approach.[30] Plays, too, could be included. It should not be too difficult for the parliamentary draftsmen to devise a satisfactory definition of "book" for this purpose.[31]

What is more difficult would be to determine whether a book just published was in fact the same as a book already covered by a decree. What if very slight, very subtle changes have been made? Is it the same book? In some cases, minor emendations would satisfactorily expurgate the book: in others, major textual alterations would leave the book substantially unimpaired. Perhaps this problem rules out the use of a jury; but it should be possible to entrust the matter to a judge, who must solve problems scarcely less intractable in cases of infringement of copyright.[32] Where, of course, the court held it to be a different book, the Attorney-General could remove the action to a different court and seek a declaration *de novo* that the book was obscene.

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[29] *Government and Mass Communications*, Vol. 1, p. 283.

[30] *Cf.* C. H. Rolph's suggestion, *op. cit.*, pp. 127–128, that the present obscenity laws should not extend to books.

[31] The all-embracing definition in s. 15 (7) of the Copyright Act 1911 would not be satisfactory for this purpose.

[32] See Copinger and Skone James on *Copyright* (10th ed., 1965), Chaps. 4 and 9; Carter-Ruck and Skone James, *Copyright* (1965), Chap. 11; and Eddy, *The Law of Copyright* (1957), pp. 66–67.

The difficulty of deterring the first publication of truly obscene material is more easily resolved. The absence of criminal sanctions need not remove all deterrent force from the law, because it is suggested that publishers would always defend any proceedings brought by the Attorney-General. Certainly at present the defendant must appear in court, but there is no compulsion on him to defend the proceedings. He may plead guilty and the issue will never go to the jury. This may be the result of a disinclination to risk incurring the crippling costs involved in defending such an action, but at the same time a good, meritorious work may no longer be available. This is all the more serious when the result is of universal application. The new procedure would not lighten the burden placed on publishers. On the contrary, a new deterrent is imposed by strengthening that burden. Otherwise, a less reputable publisher might publish all manner of pornography, knowing he ran no risk of criminal proceedings, withdrawing it only when an action was instigated by the Attorney-General. The book would then be condemned by default and the publisher or distributor would again be perfectly free to market another pornographic book until it came to the Attorney-General's attention. The publisher must be compelled to defend the action, in the interests of keeping good books in circulation and in suppressing real pornography. It would be one of the obligations of publishing a book. While these costs are an unhappy but necessary feature of the law on this subject—large commercial profits are after all at stake—a publisher whose work was vindicated would have to pay no costs, apart from his own, and ideally the Crown ought to pay his costs in full. But that may be a long way off and is part of the whole question of acquitted defendants having to pay their own legal costs. As in Massachusetts, all interested persons would have *locus standi* to defend the threatened book.

The effect of section 2 (3) of the Obscene Publications Act 1959 is that a prosecution on indictment cannot be initiated if the article in question has been in circulation for two years; in the case of summary proceedings, the time limit under section 2 (2) is one year. This should be retained, though the actual period could be varied. There would be an irrebuttable presumption that a work freely circulating for two years—or whatever period was decided on—was not obscene. But a problem does arise in connection with a book which has been declared obscene, for standards may differ from one day to the next. The obscene books of yesterday are often freely available today. To allow for this is not difficult. A decree would last, say, ten years or whatever period was thought appropriate. After that time, any interested person, including anyone wishing and entitled to publish the work in question, could have the matter redetermined. An unfavourable determination would last a further ten years. Admittedly, this aspect of the system is a species of pre-censorship, but only in the case of a book hitherto held to be obscene. A book once cleared would remain free evermore.

The final difficulty is the most formidable of all. It was expounded by Warren C.J. in his dissenting opinion in the *Kingsley Books* case, when the Supreme Court held, by a majority, that the New York statute was not invalid. He said [33]:

> " . . . the New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal law is entirely absent. In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed. Under the statute, the setting is irrelevant.
>
> " It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged not the quality of art or literature."

He repeated these sentiments in another opinion delivered on the same day in a case dealing with a traditional obscenity statute. " It is not the book that is on trial," said the Chief Justice, " it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." [34] And another judge in the *Kingsley Books* case, Douglas J., joined by Black J., also dissenting, extended the argument [35]:

> " The judge or jury which finds the publisher guilty in New York City acts on evidence that may be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester. In New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people. The nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity prosecution. Yet the present statute makes one criminal conviction conclusive and authorizes a statewide decree that subjects the distributor to the contempt power. I think every publication is a separate offence which entitles the accused to a separate trial. Juries or judges may differ in their opinions, community by community, case by case. The publisher is entitled to that leeway under our constitutional system. One is entitled to defend every utterance on its merits and not to suffer today for what he uttered yesterday. Free speech is not to be regulated like diseased cattle or impure butter. The audience (in this case the judge or the jury) that hissed yesterday may applaud today, even for the same performance."

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[33] 354 U.S. at pp. 445–446.

[34] In *Roth* v. *U.S.*, 354 U.S. 476, 495 (1957).

[35] 354 U.S. at p. 447. See also *State* v. *Andrews*, 186 A. 2d 546, 550 (Supreme Court of Errors, Conn., 1962), *per* Baldwin C.J.

Douglas and Black JJ. are completely opposed to any legislation on obscenity, while Warren C.J. was a supporter of the suppression of pornography; yet, despite such conflicting opinions, they all objected to this procedure for similar reasons. Obscenity, then, cannot be thought of as a constant. A manual on marriage is not prima facie obscene. But if it is advertised in a children's comic, it might become so. As Cockburn C.J. said in the famous *Hicklin* case[36]:

> " A medical treatise, with illustrations necessary for the information of those for whose education or information the work is intended, may, in a certain sense, be obscene, and yet not the subject for indictment; but it can never be that these prints may be exhibited for any one, boys and girls, to see as they pass. The immunity must depend on the circumstances of the publication."

The American courts, therefore, have evolved the notion of " variable obscenity." It does not involve, as did the worst excesses of the *Hicklin* formula, a test of obscenity based on the schoolchild; but a problem does arise in the case of material designed specifically for children. (It is difficult to imagine what other situations Warren C.J. and Douglas J. may have had in mind.) Section 1 (1) of the Obscene Publications Act 1959 provides that an article is obscene if it tends " to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it "; and so, in *D.P.P.* v. *A. and B. C. Chewing Gum Ltd.*,[37] a Divisional Court directed the justices to hear expert psychiatric evidence as to the likely effect that picture cards to be inserted in bubble gum packets would have on children.

United States law takes account of this, too, and the Supreme Court has held that a separate standard of judging obscenity for children may be prescribed by statute,[38] provided that at the same time it does not interfere with the availability of the material to adults.[39] A similar situation exists in the case of material designed to be disseminated primarily to " a sexually deviant group." [40] In short, the test of obscenity is to depend on the effect the material will have on the audience for whom it is principally intended, so that if it is meant for any minority audience, somehow considered more susceptible or vulnerable than a normal audience, a stricter standard of judging whether it is obscene may be applied.

How, then, can all this be reconciled with a system that cannot take account of varying standards of obscenity? Under the subsequent restraint system, a book must either be declared obscene or not obscene, regardless of the behaviour of the publisher or bookseller. And presumably there would be a similar defence to that contained in section 4 of the Obscene Publications Act 1959 providing that a book, though obscene, should nevertheless be published if it is for the public good as being in the interest of literature, science, art and so forth. So the manual on marriage could benefit from such a defence, no matter to whom it was being sold.

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[36] *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 367. See also *U.S.* v. *31 Photographs*, 156 F.Supp. 350 (1957).

[37] [1968] 1 Q.B. 159.

[38] *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Interstate Circuit Inc.* v. *Dallas*, 390 U.S. 676 (1968).

[39] *Butler* v. *Michigan*, 352 U.S. 380 (1957).

[40] *Mishkin* v. *U.S.*, 383 U.S. 502 (1966). *Cf. Volanski* v. *U.S.*, 246 F. 2d 842 (6th Cir., 1957).

The answer is to retain a separate standard for children along the lines of the Children and Young Persons (Harmful Publications) Act 1955, which deals with horror comics. Then, the new procedure would be adequate to say whether a book was obscene or not, but if it was thought that a particular book was obscene in regard to children, a prosecution could be brought, notwithstanding that there was no adverse decree against the book, nor would one be possible. The new offence would be that of "distributing harmful matter to children." It would not, of course, be enough simply to show that children had come by the book, or even that copies had been sold to them, but rather that a particular effort had been made to interest children in purchasing it. This solution seems adequately to deal with this particular difficulty and is the method adopted in Massachusetts.

CONCLUSION

In any event, the whole of the law on obscenity is in need of consolidation, bringing together in one statute all the laws concerning obscenity in the theatre, literature, the mail, the customs and so forth. At the same time the opportunity should be taken to reform those aspects of the law which experience has shown to be gravely defective. Piecemeal amendments are unsatisfactory. Those planning the consolidating statute should give consideration to introducing this fundamentally different procedure. In Massachusetts it was introduced to relax what was thought to be an over-harsh law: in Wisconsin it was to strengthen the law. It should be introduced here to remove some of the silliness which the present law imposes.

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STATUTES

THE EMPLOYER'S LIABILITY (DEFECTIVE EQUIPMENT) ACT 1969—II

A FEW very brief comments are offered on aspects of the Act not dealt with in Mr. Ingman's note,[1] though no more can be done than to point to problems. Solutions are for wiser heads than mine. First, the general structure of the Act. The employee's injury is deemed to be attributable to the employer's negligence when the *defect* causing the injury "is attributable wholly or partly to the fault[2] of a third party."[3] At first sight this looks like negligence in the air—one can only talk of negligence in relation to a particular injury to a particular plaintiff. Further, a plaintiff cannot build on conduct which may have been negligent to some other person.[4] Therefore, to make legal sense the definition of "fault" in the Act must be read as if the words "to the injured employee in respect of such injury" were added after "liability in tort" and "liability in damages." The courts seem to have acted on this (unarticulated) assumption when dealing with a somewhat similar provision in the Employer's Liability Act 1880.[5] However, the purpose of the 1969 Act—to make the employer liable whenever the third party would have been liable to the employee—could have been served far more simply by the familiar formula "would if sued have been liable in respect of the same damage."[6]

Use of this formula could also have avoided use of the word "defect,"[7] which is not a term of art. We may be driven back to the cases interpreting the 1880 Act, which reached a very wide view (*e.g.* "'Defect' means a lack or absence of something essential to completeness"[8]). However, the particular words in that Act were "any defect in the condition of the ways, works, machinery, or plant,"[9] and Bruce J. pointed out in *Tate* v. *Latham*[10] that a machine "may be in its nature and character a perfect machine and may yet be in an imperfect and defective condition." Counsel may well seize on this difference in wording in an attempt to distinguish the old cases and narrow the 1969 Act, so as not to cover, *e.g.* misleading labelling, the absence of a guard,[11] or "the erroneous judgment of the designer as to the effect of the strain which his machinery would have to resist."[12] It is to be hoped that the courts will brush such arguments aside and equate defect with danger[13] though had the Act imposed liability wherever a third party was liable to an employee in respect of an injury received in the course of his employment, otherwise than as the result of the negligence of a fellow-employee, these arguments could never be presented. Also injuries caused by dangerous materials (*e.g.* scrotal cancer caused by working with soluble oil) would be included. Materials as such may not be within the definition of "equipment" in the Act.[14]

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[1] (1970) 33 M.L.R. 70–76, where the terms of the Act are set out.

[2] Defined in s. 1 (3) of the Act as "negligence, breach of statutory duty or other act or omission which gives rise to liability in tort in England and Wales or which is wrongful and gives rise to liability in damages in Scotland."

[3] s. 1 (1) (*b*).

[4] *e.g.* a sighted man who fell over the *Haley* v. *L.E.B.* punner-hammer could not have succeeded on the ground that the Board had been negligent towards blind pedestrians.

[5] s. 2 (1). See, *e.g.* the judgment of Lord Halsbury L.C. in *Smith* v. *Baker & Co.* [1891] A.C. 325, 334, and Lord Watson at p. 352. The Act was repealed by the Law Reform (Personal Injuries) Act 1948.

[6] See the Law Reform (Married Women and Tortfeasors) Act 1935, s. 6.

[7] ". . . to attempt to define what 'defect' is in the abstract is to attempt an impossibility": *per* Lord Coleridge C.J. in *Morgan* v. *Hutchins* (1890) 59 L.J.Q.B. 197, 198.

[8] *Per* Bruce J. in *Tate* v. *Latham* [1897] 1 Q.B. 502, 506.

In contrast to "equipment," "business" suffers from an excess of judicial definition. Certainly, the definition of employee as a person employed for the purposes of a business carried on by the employer has a limiting effect, but the extent of that effect seems completely uncertain. The persistent idea that an intention to make a profit is a necessary element[15] is against the run of authority even in the Companies Act cases[16] and is positively rejected in the numerous cases concerning covenants in leases not to carry on any trade or business.[17] But no consistent principle is put forward to test what is a business—it seems to be little more than a matter of impression, and a lot depends on the context of the word's use. It is worth noting that a comprehensive definition was thought necessary in the Redundancy Payments Act 1965.[18] The 1969 Act merely provides that " business " includes the activities of " any public body," [19] whatever that may be. It would have been far better to have followed the example of the Redundancy Payments Act again: to have left the wide definition of " employee " and then to have specifically excluded those classes of employees (*e.g.* domestic servants and M.P.s' gardeners) whom Parliament wished to leave outside the Act.[20] As it is, Parliament may have excluded a far wider class than they intended. What, for instance, of employees of universities?

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[9] s. 1 (1).

[10] [1897] 1 Q.B. at p. 506.

[11] *Cf. Morgan* v. *Hutchins* (*supra*); *Tate* v. *Latham* (*supra*); *Heske* v. *Samuelson* (1883) 12 Q.B.D. 30.

[12] *Per* Kennedy J. in *Jackson* v. *Mumford* (1902) 51 W.R. 91.

[13] And in any case in many of the above situations the employer would be independently liable for breach of his duty to provide a safe system of work or under industrial safety legislation.

[14] s. 1 (3). Mr. Philip Holland and Mr. Ronald Brown raised this question during the Third Reading debate on the Bill in the Commons (H.C.Deb., Vol. 780, cols. 930, 931 (March 21, 1969)), but received no answer. There seems to be no judicial definition of "equipment." Kekewich J.'s dictum in *Re Unite* (1906) 75 L.J.Ch. 163, 165 relates to the use of the word as an action noun (*i.e.* meaning the act of equipping) which is wider than its use in the Act. For a fascinating discussion of the differences in meaning between verbs and their nouns, see Daube, *Roman Law—Linguistic, Social and Philosophical Aspects*, Chap. 1.

[15] See *e.g.* the dictionary definition cited by Jessel M.R. in *Smith* v. *Anderson* (1880) 15 Ch.D. 247, 258; and Laidlaw J.A. in *Re Pszon* [1946] 2 D.L.R. 507, 511.

[16] See H. G. Calvert (1962) 26 Conv.(N.S.) 253, 259–264, where the authorities are discussed.

[17] *Bramwell* v. *Lacy* (1879) 10 Ch.D. 691; *Tod-Heatley* v. *Benham* (1888) 40 Ch.D. 80 (hospitals for the poor businesses though run at a loss); *Rolls* v. *Miller* (1884) 27 Ch.D. 71 (home for working girls business, though no charges); *S.-W. Suburban Water Co.* v. *St. Marylebone Guardians* [1904] 2 K.B. 174, 180 (pauper school business); *Thorn* v. *Madden* [1925] Ch. 847; *Tendler* v. *Sproule* [1947] 1 All E.R. 193 (taking in paying guests business).

Finally, the practical effect of the Act must not be overestimated. If an employer wants to be obstructive and withhold information, the employee will be prejudiced just as much as before, for he still has the heavy onus of proving that *someone* has been negligent. And if the source of the defect is unknown or the manufacturer for some reason inaccessible it will need a very generous application of the maxim *res ipsa loquitur* (against a party not before the court and to the prejudice of a party who *ex hypothesi* has not himself caused the defect) to aid the employee. One wonders how far the courts will go, especially when the conduct of the employer's case will have been taken over by the insurance company under his employer's liability policy. Absolute liability for industrial accidents, alas, is not yet with us.

JOHN MESHER.

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[18] s. 25 (1).

[19] s. 1 (3).

[20] See Redundancy Payments Act 1965, s. 16.

REPORTS OF COMMITTEES

MURDER 1957 TO 1968

THE final abolition of capital punishment seems so much like a good deed in a naughty world that it has understandably overshadowed the survey of recent murders published shortly before the crucial parliamentary debates,[1] and this obscurity was no doubt assisted by the feeling generated by a quick reading of the Report or of newspaper accounts of its findings that, as many people already believed, murder was conspicuously an area in which statistics prove nothing. Two important issues do, however, stand out as requiring elucidation from the material presented in the Report.

(i) *Capital punishment and capital murder*

The prime difficulty facing anyone who tries to use the material to inquire into the effects of the abolition of capital punishment is that, although this is a Report by the Home Office Statistical Division, it contains no statistical analysis of any sort. We can only speculate whether this means that the Home Office thinks that, on a question as important as this, the general public should be content with the blunt facts, or whether there is thought to be something about these figures that makes them unsuitable for the statistical treatment which we attempt below. Certainly, the authors of the Report do not refrain from impressionistic comment; it would surely have been better and safer for them to have discussed also the statistical implications of figures which they are better placed than anyone else to understand, rather than leave these deductions to the possibly unreliable operation of private enterprise.

Table 10 of the Report reads as follows:

" Normal " and abnormal murder estimated as " capital "

	"Normal" murder						Abnormal murder					
	"Capital"		"Non-capital"		Total		"Capital"		"Non-capital"		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
1957	12	21·1	45(a)	78·9	57	100	13	16·7	65	83·3	78	100
1958	11	23·4	36	76·6	47	100	10	14·9	57	85·1	67	100
1959	9	15·8	48	84·2	57	100	14	17·9	64	82·1	78	100
1960	11	21·6	40	78·4	51	100	15	20·8	57	79·2	72	100
1961	7	13·0	47(a)	87·0	54	100	11	17·2	53	82·8	64	100
1962	4	7·1	52	92·9	56	100	14	19·2	59	80·8	73	100
1963	7	11·9	52	88·1	59	100	7	11·1	56	88·9	63	100
1964	10	13·2	66(b)	86·8	76	100	7	11·9	52	88·1	59	100
1965	•17	22·1	60	77·9	77	100	13	22·4	45	77·6	58	100
1966	29	33·0	59	67·0	88	100	7	20·6	27	79·4	34	100
1967	24	26·7	66	73·3	90	100	22	34·4	42	65·6	64	100
1968	26	27·1	70	72·9	96	100	16	30·8	36	69·2	52	100

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[1] *Murder 1957 to 1968.* A Home Office Statistical Division Report on Murder in England and Wales.

Three comments must be made about the form of this Table. First, abnormal murder includes cases where the accused was found to be insane, or suffering from diminished responsibility, and also cases where the murderer committed suicide; although this last classification was perhaps inevitable, it might need reconsideration in a fuller study in the light of West's scepticism [2] about the assertion that nearly all murder-suicides are committed by insane persons. Secondly, the death penalty remained on the statute book until the end of 1965, although its demise was anticipated and its operation in suspense throughout that year. It is therefore difficult to know whether 1965 should or should not be treated as a post-abolition year. The report seems to think that it should not, otherwise it is difficult to justify the authors' comment that Table 10 " shows that there were rises in the figures for both ' capital ' and ' non-capital ' murder and that these started before there was a change in the law." [3]

Thirdly, after 1965, with capital murder no longer a legally recognised category, it was necessary to estimate whether or not a murder would, under the old law, have been counted as capital. This leads the authors to the conclusion that " the figures since 1965 are inevitably over-estimated since offences are classified as ' capital ' on the basis of circumstances on which doubt might have been thrown in the course of trial if capital murder had been an issue," [4] and this point is developed elsewhere by pointing out that of the sixty-nine men convicted of murder for theft or gain from 1957 to 1964 only forty-one were convicted of capital murder,[5] the deduction being that juries were reluctant to convict of capital murder, comparability before and after 1965 being therefore suspect.[6]

In the summary of the Report's findings this is the only direct reference that is made to the apparent sharp rise in capital murder after the abolition of capital punishment. In the circumstances, therefore, it might be thought misleading for the authors to make a point of saying that " The most striking feature of the increase in 1964 was a sudden rise in the number of persons convicted of capital murder." [7] It is not clear why the number of *convictions*, rather than the number of actual murders, is introduced here, since the former figure is inevitably a less accurate indication of the general murder pattern. However, if a rise in convictions for capital murder from four in 1963 to eleven in 1964 is singled out, the rise in the same figure from twelve in 1965 to twenty-nine in 1966 might be thought worthy of comment based on something more than the alleged unreliability of the figures. This last argument was much used by abolitionists in the parliamentary debates to deny the significance of the rise in capital murder since abolition,[8] but if the Statistical Division are going to attack their own methodology in a document prepared for use in the making of crucial policy decisions, the alleged unreliability of the courts before 1965 should be more fully documented. Certainly, a study of the admittedly incomplete reports of cases between 1957 and 1962 given by Morris and Blom-Cooper[9] shows few cases where on the facts given a capital conviction was justified but was not obtained.

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[2] *Murder Followed by Suicide* (1965), pp. 143–146.

[3] *Murder*, para. 23.

[4] *Ibid.*, para. 21.

[5] *Ibid.*, para. 88.

[6] *Ibid.*, paras. 76–77.

[7] *Ibid.*, para. 85.

The abolitionist must also face the problem that, on the assumption that capital punishment has no effect on the murder rate, and that this rate may be expected to remain constant from year to year, even if all murders for gain prior to 1965 had been classified as "capital", the rise in capital murder after abolition is still statistically significant.[10] This alarming result does, however, depend on the assumption that the murder rate can be expected to remain constant. If the actual murder rate is compared with the total of indictable offences,[11] rather than with a hypothetically constant murder rate, a different picture emerges. By this method, the total number of offences for a given year was expressed as a percentage of the total number of crimes committed in the twelve-year period 1957–68, and the number of murders similarly converted to a percentage of the relevant kind of murder over the same period. The general crime rate, and not the hypothetically constant murder rate, was then taken as the expected frequency, and χ^2 calculated in the normal way.

This approach seems to produce a χ^2 figure for the comparison between the increase in indictable offences and the increase in the various sub-categories of murder of 2·89 for all murders, 1·40 for "normal" murders, and 17·78 for capital murders. None of these figures is statistically significant, though the last nearly is. On this basis, it would seem that murder has not increased significantly more than the total of indictable crimes, and that although the increase in capital murder markedly outruns the general increase in crime, it does not do so in a way that is statistically significant. The appropriateness of the general rate of indictable crime to this comparison might, of course, be challenged, but by using the Spearmen rank correlation method, normal murders were found to correlate with indictable crime at the high level of 0·862, thus strongly suggesting that rises in the murder rate are appropriately compared with rises in indictable crime.

It therefore seems from these calculations that there is a close connection between normal murder and indictable crime in general, and that, whilst capital punishment seems to have *some* effect on the murder rate, the connection is probably a weak one. More information about the characteristics of murder, together with more information about the relationship of the various murder rates to the size of the general population, which is missing from the present report, might enable a more sophisticated analysis to be made of the various factors which influence murder.[12] It is a pity that these questions are not taken up in *Murder*, in view of their obvious relevance both to crime in general and to the abolitionist case.

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[8] *e.g.* Sir Edward Boyle, H.C.Deb., Vol. 818, col. 1249.

[9] *A Calendar of Murder* (1964).

[10] Taking the actual against the expected murder rate for the four years 1965–1968, $\chi^2 = 49{\cdot}7$.

[11] Figures taken from *Murder*, Table 3.

(ii) *Cultural barriers against homicide*

Researchers who have commented on the low rate of homicide in England when compared with America have suggested that an explanation may be found in the theory that " cultural barriers against murderous violence are very high in this country." [13] There are two main strands in this culture-comparison approach. First, it may be suggested that the general level of violence, violence as a way of life, is not so high in England as in America, or at least as in the semi-ghetto situation which plays so large a part in Wolfgang's study of Philadelphia. Secondly, if violence against others is a common feature of a society, not only will the total number of incidents of violence, and therefore the total number of potentially murderous situations, be large, but also persons with a psychological propensity to aggression may be tempted to regard other-directed violence as an appropriate, because culturally-approved, means of working out their problems. Discussing the fact that the ghetto situation tends to produce homicide rather than suicide among Philadelphia negroes, Wolfgang suggests that this may be because of " other-oriented aggression manifested by lower-status groups, and self-oriented aggression manifested by higher-status groups," [14] and West that

> " On the assumption that melancholic thinking is relatively immune from cultural determinants, but that schizophrenics may sometimes reflect in morbidly exaggerated form the violent tendencies prevalent in certain sections of the community, the preponderance of schizophrenics among American psychotic murderers would be an understandable concomitant of the high murder rate in America." [15]

With an increase in crimes of violence against the person per million of the population from 244 in 1957 to 655 in 1968,[16] we

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[12] It is hoped to pursue some of these points in a further paper.

[13] West, *op. cit.*, p. 141; Wolfgang, *Patterns in Criminal Homicide* (1958), pp. 332 and 334.

[14] Wolfgang, *op. cit.*, p. 330; Henry and Short, *Suicide and Homicide* (1954), pp. 94–96.

[15] West, *op. cit.*, p. 91.

[16] *Murder*, Table 3.

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might be tempted to wonder whether there is any evidence of the breaking down of the cultural barriers behind which this country's murder rate is alleged to shelter, particularly in view of suggestions in a previous study of America that in terms of such factors as place of occurrence, and the age, sex and ethnic origins of the offender, homicide and aggravated assault are "basically the same category of behaviour,"[17] together with McClintock's finding that the majority of persons in his sample convicted of homicide or murderous assaults had similar records and social background to those who were convicted of wounding offences.[18] Since *Murder* does not analyse individual cases it is very difficult to draw conclusions from the global figures which it gives for the motives and methods of murderers taken as a class, but one or two points at least may be made in this connection.

First, and importantly, using the method described above, a comparison between the violent crime rate and the total murder rate for the period 1957–68 produced a χ^2 figure of 9·58 which, at eleven degrees of freedom, is some way from being statistically significant. This suggests, therefore, that arguments claiming a direct influence of violent crime on the murder rate must be treated with reserve. Secondly, however, as far as normal murder is concerned, "the increase in the numbers convicted of murder was mainly among those whose motives were rage, quarrel, jealousy or revenge: this type of murder is often akin to manslaughter, convictions of which increased at a greater rate."[19] This is rather an enigmatic pronouncement, but it seems to suggest that there has been some increase in murders attributable to the kind of almost casual flare-ups that play a large part in the incidence of assault and other non-fatal offences against the person.[20] This is perhaps borne out by the fact that, at least among male adult murderers, rage and quarrel preponderate over the other motives mentioned by the Statistical Division.[21] The figures involved are, however, small, and we must await further enlightenment on the subject from the projected report on manslaughter.[22]

Some further evidence in support of a closer link than previously between the incidence of murder and the general pattern of violence may be found in the methods used by murderers, though here again we must stress that the low total figures, and the absence from *Murder* of any classification of offences with respect to the circumstances in which they were committed, require speculation rather than assertion on this point. An increase is reported in offences committed with sharp instruments. In *Murder* the figures are inconveniently distributed amongst two tables according to whether the murder is classified as normal or abnormal, but a conflation of Table 20 with Table 46 suggests that the yearly average of sharp instrument murders was thirty-one in the period 1957–62 and fifty-one in the period 1963–68. In view of American findings about the common use of knives in sub-cultural violence,[23] some investigation of the sociology of recent stabbing murders would seem to be an urgent priority. An enhanced role for the more familiar and homely English violence [24] is perhaps shown by the fact that (normal) "murder without weapons, by hitting and kicking was relatively high in 1967 and 1968." [25] The increase was, however, not sensational,[26] and more must be known about the individual cases before we can be sure that this is pub and street brawling taking a new and homicidal turn.

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[17] Pokorny (1965) 56 J.Crim. Law 497. Similar findings on another sample by Pittman and Hand (1964) 55 J.Crim. Law 462.

[18] *Crimes of Violence* (1965), p. 224.

[19] *Murder*, para. 89.

[20] McClintock, *op. cit.*, p. 56.

[21] Between 1964 and 1968, 47 such murders were attributable to rage or quarrel, as opposed to 14 attributable to jealousy or revenge: *Murder*, Table 19.

[22] *Murder*, para. 48.

The other aspect of the atmosphere of violence theory, relating to its effect on disturbed personalities, is even more difficult to elucidate from the figures, though the decrease in "abnormal" murder [27] is obviously important. West suggests that a high proportion of subsequent suicides amongst murderers is an indication of the existence of the cultural barrier situation,[28] but although the percentage of murder suspects who commit suicide has dropped slightly since 1962 the change cannot yet be regarded as significant in any sense.[29] In section 2 manslaughter "the most striking feature is the increase over the period in the number of cases in which no motive could be found; these appeared to be incidents of wholly irrational violence by offenders who had records of mental disturbance or mental illness." [30] The Statistical Division suggest, however, that this does not in fact represent an increase in the incidence of entirely irrational killing, but only an increased tendency to use diminished responsibility rather than insanity as a defence in cases of mental disturbance. Certainly, the figures that they quote of the totals reached by adding motiveless section 2 manslaughters to insane murders for each year since 1957 seem convincing on this point.[31]

There seems therefore no evidence that the increase in violent crime has yet produced a situation in which social mores trigger disturbed people in a homicidal direction. However, if the increase represents an intensification of the characteristics of violence found by earlier researchers, rather than a spread of violence into new cultural situations, it will still have been sufficiently localised not to have any general social effect. For this reason, the incidents which seem to need investigation from the point of view of a connection between homicide and violence generally are those discussed earlier, where it may be the case that an increasing number of homicides are occurring because of an increase in the number of acts of normal violence.[32]

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[23] Wolfgang, *op. cit.*, p. 332.

[24] More than half of those concerned in offences of violence against the person in the Metropolitan Police area in 1950, 1957 and 1960 "had no weapon at all and attacked their victims by punching and kicking them": McClintock, *op. cit.*, p. 57 and Tables 25 and 25A.

[25] *Murder*, para. 33.

[26] 14 normal murders by this method in 1967 and 12 in 1968, as against an annual average between 1957 and 1966 of 6·7 per annum: figures abstracted from *Murder*, Table 20.

[27] *Murder*, Table 10.

[28] West, *op. cit.*, p. 141.

[29] *Murder*, Table 32.

[30] *Ibid.*, para. 58.

[31] *Ibid.*

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[32] I am very grateful to Miss Maeve Denby, of the Oxford University Department of Education, for providing the major part of the statistical calculations in this paper, and for other valuable suggestions.

NOTES OF CASES

TORTS OUT OF CONTRACTS: TRANSATLANTIC WARNINGS

ENGLISH law now arguably includes a novel tort liability, *interference* with contract which is " direct " and " deliberate." The novelty is twofold. The interference neither induced a breach of the contract nor used any means in itself unlawful. It is *mere* interference, including the case where " a third person *prevents* or *hinders* one party from performing his contract." In so holding in 1969 Lord Denning M.R. said:

> " The time has come when the principle [of *Lumley* v. *Gye* [1]] should be further extended to cover ' deliberate and direct interference with the execution of a contract without that causing any breach ' . . . the common law would be seriously deficient if it did not condemn such interference." [2]

Since any such liabilities for hindering performance of contract need careful consideration, a glance at recent experience in North America is timely.

Canadian tort liabilities have rested (in common law jurisdictions) on principles drawn from the English. In *Einhorn* v. *Westmount Investments Ltd.*,[3] the opportunity to follow the new English wave and make torts out of hindered contracts was eagerly seized. Three defendants, the Belzbergs, controlled certain companies, including W. Ltd. Einhorn had a contract with W. Ltd. under which he was entitled to payments. The Belzbergs transferred to a newly incorporated company, also under their control, the sole valuable asset of W. Ltd. Einhorn's administratrix sued, alleging (*inter alia*) a wrongful procurement of breach of, or interference with, the contract. The Belzbergs replied that the pleadings disclosed in that respect no cause of action against them. They failed, the court holding *inter alia* that a cause of action could subsist because the facts, if true, could give rise to liability for actionable interference with the contract.

Even where a corporation acts in breach of contract, the directors causing it so to act have not normally been made liable for the tort of inducing breach if they acted bona fide within their authority for the company.[4] A similar principle applies in most United States jurisdictions if the officers " acted in good faith to serve the company," liability arising only if they procured the corporate action "either maliciously or for their own personal gain." [5] In the Canadian decision these principles were swept aside almost peremptorily by Disbery J., who relied upon the principles enunciated by Lord Denning M.R. He added that if Saskatchewan law had not yet extended the older principle to catch "deliberate and direct interference" with contract, "I so extend the application of the principle." [6]

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[1] (1853) 2 E. & B. 216.

[2] *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 Ch. 106, 138. Winn L.J. apparently agreed *obiter* at p. 147. See A. S. Grabiner (1969) 32 M.L.R. 435.

[3] (1969) 6 D.L.R. (3d) 71 (Saskatchewan Q.B.; Disbery J.).

[4] *Said* v. *Butt* [1920] 3 K.B. 497; *Scammell & Nephew Ltd.* v. *Hurley* [1929] 1 K.B. 419.

He took the new principle to establish that a third party who renders "performance impossible" will be liable for interference [7]:

> "Where as here, the performance by one of the contracting parties consists in making a money payment, I am unable to think of a more effective method of rendering performance impossible than that of emptying the till by transferring the contracting party's assets to other persons."

No clearer example could be given of the need for caution in accepting the new tort. The decision itself may be just (and could have been achieved by other arguments); but what of the principle? Even if, as the present writer has suggested, the new principle should be restricted at most to interference inducing frustration or impossibility of contractual performance,[8] the Canadian case shows how problematical even that extension might prove to be in commercial transactions. Just when and how far can a party take deliberate commercial action for his own ends which he knows will make it more difficult, or perhaps impossible, for a rival trader to pay off a debt to a creditor by "emptying his till" of money? In a conglomerate group of companies, when will the controllers be liable for hindering the performance of contracts by one company in the group by switching its assets, bona fide for long-term corporate purposes, to an associated enterprise?

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[5] Cary, *Cases and Materials on Corporations* (4th ed., 1969), p. 365, citing *Slavenberg Soelling Corpn.* v. *Assomull & Co. Inc.*, 29 Misc. (2d) 232; 213 N.Y.S. (2d) 303 (1961): corporation assigned accounts to plaintiff and to another corporation; officer liable who dishonestly induced this breach of contract. See too *Wampler* v. *Palmerton* 439 P. (2d) 601 (S.C. Oreg.) (1968): officers acting bona fide for the corporate benefit not liable for inducing a breach by corporation even though they had a personal interest and would also benefit from the breach. But honest belief has been held to be insufficient in the absence of proven prospective benefit to the corporation: *Ehrlich* v. *Alper*, 145 N.Y.S. (2d) 252, 254 (S.C. 1955); aff'd. 149 N.Y.S. (2d) 562 (1956).

[6] (1969) 6 D.L.R. (3d) at p. 75 He continued that the court would not be frustrated by persons who "carry out intentional tortious acts through the medium of a puppet corporation whose every action they control" . . . "clothing themselves in a corporate veil of their own spinning." His determination to rend the corporate veil suggests that he thought the defendants might not have pursued bona fide the purpose of benefiting the corporation in disposing of its only valuable asset. The amended pleadings alleged that the disposition was a fraudulent preference and improper as being made *mala fide* without consideration. These factors were not discussed in regard to the personal claim against the Belzbergs. It is for consideration whether they might be considered as an "unlawful" means.

[7] *Ibid.* at p. 76. It bears repeating that this statement describes acts that fall short of any extraneous wrongdoing, including any fraudulent preference or the like.

[8] *Clerk and Lindsell on Torts* (13th ed. 1969), p. 336.

Secondly, it is noteworthy that the examples given by Lord Denning M.R. and Disbery J. to support their extension of the law are not even pure examples of the new tort. Both rely, for example, upon the person who, knowing of a singer's contract to appear, gives her a potion to make her sick for the performance. No breach of contract by the singer results. But " the person who administered the potion would have done wrong and be liable " to the singer's employer.[9] This is not a case of mere interference. The third party has, in deliberately administering the potion, done an act wrongful in itself. The case has turned into one of interference with economic relations by *unlawful* means.[10] Apart from the Canadian decision itself, only Winn L.J. has so far given other illustrations.[11] It is noteworthy that Disbery J. does not refer to those dicta.

But it may be objected: why should the technicality of " breach " and " unlawful means " matter so much? In a " modern " system of law (by which is often meant one in which judicial policy replaces, rather than guides, the law) they would surely disappear. A comparison with the law in various jurisdictions of the United States suggests that, apart from any other demerits, such a view is unrealistically simplistic.

The principle of *Lumley* v. *Gye* was applied early in the U.S.A. without insistence on proof of actual breach. Liability thus arose for " interference " by rendering performance of a contract more onerous.[12] So, it has come to be orthodox law that " any conduct which is intended to and which in fact makes performance more onerous is, unless privileged, a tort against the promisor " [13]; and an " unlawful interference " is said to be just as much " a legal wrong as is the unlawful inducement of a breach." [14] Moreover, without the obstacle of cases like *Bowen* v. *Hall*,[15] many American courts extended liability to cover interference with economic relations even in the absence of any contract at all. Thus, liability for inducing breach came to be " regarded as merely one instance of protection against such unjustified interference " with business relations; and the cases of interference with contract are discussed as a group "chiefly as a matter of convenience."[16] But without more, such liabilities would be endless. As the limiting factor American courts utilised "privilege" or "just cause." The equivalent English and Canadian concept of "justification"[17] has traditionally been extremely narrow. The law in the U.S.A. tends to justify the defendant's action if the "ultimate purpose or object" finds favour with the court.

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[9] [1969] 2 Ch. at p. 137, cited in (1969) 6 D.L.R. (3d) at p. 76.

[10] Compare *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 Q.B. 762 (C.A.). The examples are likened to the case of inducing breach by taking a man's essential tools, again a direct and *wrongful* act against the machinery of the contract: Morris L.J. in *Thomson* v. *Deakin* [1952] Ch. 646, 701.

[11] [1969] 2 Ch. at p. 147, suggesting that interference which limits the range of optional modes of performance would be actionable if the plaintiff had come to expect to use the mode foreclosed by the defendant.

[12] See *e.g.* *McNary* v. *Chamberlain*, 34 Conn. 384 (1867), though in this and similar cases illegal acts had been committed by the defendant.

[13] Harper and James, *Law of Torts*, Vol. 1 (1956), pp. 499–500.

[14] *Morris* v. *Blume*, 55 N.Y.S. (2d) 196, 199, aff'd. 56 N.Y.S. (2d) 414 (1945).

[15] (1881) 6 Q.B.D. 333.

The relevance of interference with contract is usually to throw the burden of justifying more clearly upon the defendant.[18] The defendant may be "privileged to invade an interest of the plaintiff . . . if the invasion is in furtherance of a social interest of greater public import than is the social interest invaded."[19] Recent cases disclose a vigorous application of this concept and the allied notion that a defendant should be excused if acting in good faith for his own legitimate purposes.[20] The interest of the American plaintiff has been said to be an interest "in not having his contract rights interfered with by intermeddling strangers."[21]

It may come, therefore, as a surprise to realise that even in the United States liability for mere interference with contract is not without problems parallel to those raised here. In *Cable Vision Inc.* v. *KUTV Inc.*,[22] defendants operated a system which could pick up broadcasts from elsewhere and relay them to local subscribers. Plaintiffs were a local television station to which a national network had contractually granted exclusive rights in programmes which the defendants had relayed. The court agreed that no breach of contract had been caused but held the defendants liable because "anyone who so tortiously and unfairly interferes with such an economically advantageous contractual relationship as to make its performance impossible or more onerous" is liable.[23] This decision caused anxiety among commentators[24]:

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[16] Prosser, *Torts* (3rd ed. 1964), pp. 954–955.

[17] *Posluns* v. *Toronto Stock Exchange* (1964) 46 D.L.R. (2d) 210, 270; aff'd. (1968) 67 D.L.R. (2d) 165. For English cases see: *Clerk and Lindsell*, *op. cit.*, pp. 894–896.

[18] See Prosser, *op. cit.*, pp. 967–970 and pp. 976–986, on the "privilege of competition"; Green, Malone, Pedrick and Rahl, *Cases on Injuries to Relations* (1959), pp. 78–80.

[19] Carpenter (1928), 41 Harv.L.R. 728, 745, discussed Harper and James, *op. cit.*, pp. 514–526.

[20] See *United Aircraft Corpn.* v. *Boreen*, 418 F. (2d) 694 (1969).

[21] *Wampler* v. *Palmerton* (1967) 439 P. (2d) 601, 607 (S.C. Oreg.). This opinion also adverts to tort liability for "malicious" or unjustified injury by way of breach of contract which can, in some jurisdictions, give rise to a liability in *tort* on the part of the contract breaker himself: *ibid*. p. 608. See the useful note: "Prima facie tort" 16 A.L.R. 3d. 1191 (1967).

[22] 211 F. Supp. 47 (D. Idaho 1962); vacated on other grounds pertaining to copyright law, 335 F. (2d) 348 (1964), cert. den. 379 U.S. 989. See *Herald Publishing Co* v. *Florida Antennavision Co.*; 173 So. (2d) 469, 473–474 (1965 D.C.Fla.).

[23] *Ibid.*, pp. 60–61. The court had earlier dubbed this a case of "unfair competition," pp. 58–59.

[24] Note: Competitive Torts (1964) 77 Harv.L.R. 888, 968.

> "The court failed to specify . . . just how either party's performance had been made more difficult . . . it seemed to hold that the defendant . . . might be liable simply because it had diminished the value of the plaintiff's contractual interests. But any such diminution came through competition just as the value of a grocery store lease is diminished when a rival grocery store opens next door."

When courts which can operate with very flexible principles of "privilege," "justification," "just cause" and the like, run into difficulties of this kind by applying what the same commentator called "amorphous tort standards" on mere interference with contract, how much more careful should English courts be who lack that armoury of conceptual weapons. The spectacle of a Canadian court thrusting the rugged but amorphous new tort into law of the English style affords a useful warning. Lord Donovan described as "novel and surprising" the principle "that there is a tort consisting of some undefinable interference with business contracts falling short of inducing a breach of contract." [25] Retention of this new tort would demand equally novel concepts of "privilege," "justification," or "fair competition" as limiting factors. Years of judgments would be needed to create them. A New Zealand court has recently shown what might be achieved with even the old concept of "justification".[26] More important, do we want increasingly extensive questions concerning the relative "public import" of social interests decided by judges who are unguided by statute? Might it not be better, after all, to return for now to the English common law? [27]

K. W. WEDDERBURN.

EXPULSION FROM TRADE UNIONS

THE decision of Buckley J. in *Edwards* v. *S.O.G.A.T.*[1] is another of those cases of some significance to the trade union movement. Briefly the facts are as follows. In 1967 the plaintiff, a skilled printer, was wrongfully [2] dismissed from his union for non-payment of contributions [3] and consequently, owing to the existence of a closed shop, from his employment. After having been unemployed "for some time" he eventually found employment with a non-union firm, Boxmakers Ltd., from which he was dismissed in May 1969. The situation which gave rise to his dismissal from Boxmakers was a refusal to carry out the unlawful (*i.e.* not contractually obligatory) order of his employer to undertake certain non-skilled work.[4] From that date until the hearing of the action the plaintiff remained jobless.

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[25] *Stratford & Son Ltd.* v. *Lindley* [1965] A.C. 269, 340.

[26] A union official was held to have "a duty" to induce breach where his acts were "not being used as a sword to procure financial betterment but as a shield to avoid involvement in industrial discord—Discord which the defendant union was entitled not to be involved in. . . ." *per* Speight J., *Pete's Towing Services Ltd.* v. *Northern Industrial Union* [1970] N.Z.L.R. 32, 51. That decision was, however, intimately related to the special labour law legislation in New Zealand. Nevertheless, English judges may soon exhibit similar tendencies to develop "justification". (See Lord Denning M.R. in *Morgan* v. *Fry* [1968] 2 Q.B. 710, 729, on the possible justification for intimidation where plaintiffs are "troublemakers.") That tendency may be accelerated by the way in which the novel tort eases the path of plaintiffs asking for *ex parte* labour injunctions: see *Boston Deep Sea Fisheries Ltd.* v. *T.G.W.U.*, *The Times*, March 12, 13, 16, 17 and 19, 1970. The conflict of industrial interests involved in such cases illustrates both the points made in this note and the urgency of the need for legislation.

[27] If the new tort survives, the Law Commission will presumably wish to deal with it so that it does not disturb a new code on the law of contract.

[1] [1970] 1 W.L.R. 379; [1970] 1 All E.R. 905.

The immediately arresting feature of the case, an action for breach of the contract of trade union membership,[5] is the sum awarded by his Lordship; *viz.* £7,971.[6] By the time of the trial of the action the issues had resolved themselves into two—*viz.*, did the plaintiff's dismissal from Boxmakers operate as a *novus actus* terminating the union's liability and if not how was the appropriate quantum to be assessed when his employment prospects, though poor, were in reality unassessable?

Accepting the inevitability of a *terminus ad quem* Buckley J. could not accept that it had arrived with the plaintiff's second dismissal, and foreseeing no immediate likelihood of employment in work of a similar nature he used a multiplier of ten to assess "general" damages. It should be added that a shortage of opportunities for skilled workers in the area allied to an idiosyncratic system of promotions obtaining in the industry, a genuinely "closed" shop and a dichotomy between the statuses of temporary and permanent membership conspired to produce singularly poor employment prospects in this instance.

Rarefied rules concerning foreseeability [7] are seldom of assistance in matters of this nature so that one is ultimately forced to justify continuing liability on the basis of an informed analysis of the social context. In this respect it is submitted that his Lordship's finding of continued responsibility after the second dismissal was correct. Since liability would clearly have continued had the plaintiff found merely temporary employment it is but a short step to argue for continuation of liability during a period of less secure employment—for that is the nature of non-union employment when compared to the protection afforded by a closed shop. Both familiarity with the industrial scene and a reading of the judgment would preclude dismissal as an industrial reality for refusal to touch unskilled work—productivity accommodations concerning "flexibility" apart. It is nonetheless difficult to accept that the act of leaving Boxmakers' employment "whatever the circumstances"[8] would not have ended the right to damages.

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[2] After the commencement of proceedings the union conceded the illegality of their action but no explanation appears in the judgment.

[3] Of the many thousands of members excluded each year the vast majority are written off solely for non-payment of union contributions. See evidence of the T.U.C. to the Royal Commission on Trade Unions etc. (Donovan), para. 452 (Cmnd. 3623).

[4] *Quaere* whether his Lordship's decision would have been the same had the order been lawful but one for breach of which dismissal had never previously occurred?

[5] The plaintiff had consented to the operation of the check-off principle upon his wages. Apparently some oversight by the union had caused his unwitting default. *Quaere* a negligence action against the individuals responsible?

[6] Awarded on the personal injuries principle of special damages up to the moment of trial and general damages thereafter. For previous actions in damages for wrongful expulsion, see *Clarke* v. *N.U.F.T.O.*, *The Times*, October 18, 1957; *Harkness* v. *E.T.U.*, *The Times*, June 30, and *Payne* v. *E.T.U.*, *The Times*, April 14, 1960. Of these the *Harkness* award at £596 was the largest. In 1968 Rideout was able to say that the normal sum awarded in such cases was between £200 and £500. See *Right to Membership of a Trade Union*, p. 235.

[7] See *Mayne and McGregor on Damages* (12th ed.), paras. 115–121 and as to mitigation, Chap. 7 generally. The American courts have encountered difficulty in assessing remoteness and have merely talked in terms of injuries "directly and proximately" caused by improper discipline. See Etelson and Smith (1969) 82 Harv.L.R. 727, 769.

Again, comment on the decision concerning the measure of damages must be restricted to a factual interpretation though an observer might regard the award as being somewhat generous.[9] Perhaps the only guide available to his Lordship was the Donovan suggestion of a ceiling of two years' wages in such a situation.[10] The temptation to use this as an escape route must have been considerable. On the other hand the relatively lengthy discussion of the duty to mitigate in the judgment seems to be somewhat *de trop* since after holding out the plaintiff's conduct as exemplary in this particular his Lordship assumes a fictional mitigation for the purpose of assessing general damages. Whether the discussion was pertinent to the duty owed by the plaintiff in assessing special damages (some £1,211) is not apparent since they are not broken down. At what stage, therefore, rejection of alternative employment becomes improper is somewhat obscure.[11]

Lack of space prevents pursuance of a number of matters of potential interest raised by the decision[12] but certain wider considerations call for comment concerning the unsatisfactory nature of both the law and the conduct of trade union affairs. The size of the award in this case brings such deficiencies into relief.

First a comment on the inconsistencies of the law. Without prejudice to the need (which the writer freely admits) to compensate

[8] [1970] 1 W.L.R. at p. 385.

[9] Apart from one extreme instance where five members were awarded $250,000 the "normal" equivalent in the U.S.A. would still present the damages in *Edwards* as generous. See Summers (1960) 70 Yale L.J. 175, 217.

[10] para. 661. Interestingly this would have produced at most £1,852 in this case.

[11] Nonetheless support for Buckley J.'s general stand can be seen illustrated by Summers (1951) 64 Harv.L.R. 1049.

[12] No damages were awarded apparently for what Grunfeld calls deprivation of "civic rights," *Modern Trade Union Law*, p. 201, though they may well be swallowed in an award of this size.
For occasional American sophistication in assessing damages in such matters see *Malloy v. Carroll* 191 N.E. 661 (1934).

trade union members for arbitrary action causing them substantial loss, the immensely favourable position of the employer is striking. Examine the situation of Mr. Edwards. Assuming his contractual due on termination of employment to be four weeks' pay [13] a *wrongful* dismissal by his employer would have provided damages amounting to 4 × £80 [14] minus unemployment benefit (wage-related).[15] In all probably not more than £70 but in any event some considerable way short of £8,000. Such a case presents a glaring illustration of the respective legal liabilities of employer and union in our labour law.[16] When it became apparent that trade unions could be made liable in damages [17] no attempt was made to find an early *terminus ad quem* analogous to the worker-employer situation—*viz.* the time when the union could next *lawfully* have expelled the member. In the *Edwards* case this parallel appears particularly forceful on account of the summary powers afforded under the rules to the branch committee of the union in relation to temporary members.

It is no secret that the trade union movement has expressed concern at the decision.[18] The very size of the award, if left undisturbed, will force the demand for change—but of what order? The alternatives are a change in the law or in trade union rules and practice—or both. A cursory glance at these matters may be of interest.

The problem is very simply the closed shop.[19] What of Donovan and *In Place of Strife*? [20] A distinction seems to be there drawn between a lawful expulsion followed by loss of job and an unlawful expulsion followed by loss of job.[21] In the first situation there is considerable support for causing the employer to compensate [22] while in the second case some independent body might be charged with hearing any complaint against a trade union. Applying these notions to the *Edwards* case, whereas the projected conciliatory role of the Registrar [23] might have proved of considerable value, reinstatement in the union *alone* [24] would clearly have proved inadequate, as indeed would the damages envisaged where no settlement was reached, always assuming that the ceiling suggested by Donovan was accepted.[25] Failing adequate preventive action, to which it is next proposed to turn, reinstatement in both union and job should be seriously contemplated. Nor is it at all clear why an employer who compounds a union's wrongful action should not contribute equally to whatever measure of compensation is deemed appropriate.[26]

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[13] Which was the notice he actually received on dismissal from his original employment.

[14] His previous *net* average earnings.

[15] It would be proper to exclude mitigation here, given the facts of the case.

[16] The limits on wrongful dismissal by an employer are well stated by Lord Loreburn L.C. in *Addis* v. *Gramophone Co. Ltd.* [1909] A.C. 488, 491. For additional judicially imposed advantages, see *Parsons* v. *B.N.M. Laboratories Ltd.* [1964] 1 Q.B. 95 and *B.T.C.* v. *Gourley* [1956] A.C. 185 (though the latter decision worked to the advantage of the union in the present case). The employer's normal exemption from natural justice requirements is reiterated in *Ridge* v. *Baldwin* [1964] A.C. 40.

[17] *Bonsor* v. *Musicians Union* [1956] A.C. 104. For the "*Bonsor* Syndrome" in the U.S.A., see Summers (1960) 70 Yale L.J. 175, 214–215.

[18] The T.U.C. report for 1966, para. 487, took the view that with full employment "substantial damages arising from the misapplication . . . of union rules" could be discounted Thus post-*Bonsor* action was unnecessary. Rideout too exuded optimism in accepting that automatic forfeiture would do little harm if "limited to offences involving financial default": *op. cit.*, pp. 111–112.

[19] See Donovan, para. 602.

[20] A Policy for Industrial Relations, Cmnd. 3888.

[21] Donovan, para. 563. *In Place of Strife*, paras. 115–118.

[22] Donovan, *ibid.*

Reform of union rules is nonetheless the only satisfactory answer—as indeed it has always been.[27] Currently the T.U.C. are, of course, undertaking a survey of the rules of affiliated unions with a view to suggesting, *inter alia*, model forms. They admit, however, to having difficulty in finding a uniformly acceptable principle on which to operate concerning situations such as here described. Moreover, in this regard Donovan and *In Place of Strife* simply are not good enough.[28] What is required is the outlawing of the automatic forfeiture rule (which is common in relation to lapsing of contributions—and not susceptible, in all probability, to the rules of natural justice [29]) accompanied by a proviso for the retention of union membership during an appeal for the purpose of retaining employment in a closed shop situation.[30] New laws on arbitrary dismissal could reinforce this protection by making it *per se* unlawful for an employer to dismiss during such a period.[31] If the unions are unwilling to adopt such rules to protect both their funds and their members, then official coyness in this regard should be cast aside in favour of early legislation.

One matter however is certain; this note is not the last to be heard of *Edwards* v. *S.O.G.A.T.*[32] If its occurrence contributes to producing an atmosphere of true job security then that will be no bad thing.

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[23] *In Place of Strife*, para. 115.

[24] *Ibid.*, para. 116.

[25] para. 661.

[26] Clark in (1969) 32 M.L.R. 532 argues for reinstatement in employment after wrongful dismissal just as the courts have reinstated in union membership, but does not directly marry the two. But see Levy (1969) 18 I.C.L.Q. 558, 579. In the U.S.A. wrongful discharge caused by the union is remedied by the reinstatement of the worker to his former position and an order imposing joint and several liability on the company and the union for any loss attributable to the unlawful discharge. Reinstatement is also supported by Summers since, *inter alia*, in the American experience damages are often not collected for fear of ostracism. (1960) 70 Yale L.J. at p. 217.

[27] See McCarthy, *The Closed Shop in Great Britain*, pp. 269–270 and particularly that automatic lapsing of membership should only be authorised after six months and then after written notification. This would preclude victimisation by "allowing" falling into arrears. See also Wedderburn (1957) 20 M.L.R. at pp. 118–119.

[28] paras. 651 and 109 respectively.

[29] See Rideout, *op. cit.*, pp. 111–113.

[30] See Grunfeld's written evidence to the Donovan Commission.

[31] On this point, see Levy, *loc. cit.*, p. 611.

NORMAN LEWIS.

EXTENDING THE LIMITATION PERIOD

IRONICALLY, the Limitation Acts, although they were designed to bring an end to litigation,[1] have proved to be one of the most fruitful sources of litigation in recent years with something over 100 reported decisions since 1957. To overcome the hardships of these statutes [2] various exceptions are contained in the latest Acts, and the Limitation Act 1963 empowered the court in its discretion to extend the limitation period under certain circumstances. Several recent decisions have been concerned with the exceptions [3] and one has involved a consideration of certain provisions of the 1963 Act.[4]

In *Hewer* v. *Bryant* [5] the court was concerned with the provisions of section 22 (2) (*b*) of the Limitation Act 1939, and in particular with the meaning of the words "custody of a parent." In that case the plaintiff had left school at the age of fifteen years. After attending a course at an agricultural training centre, he had been sent for practical training on a farm. Whilst there he had received his keep and wages at the Agricultural Wages Board's rate, so that he was economically independent of his father, who made no allowance to him. The plaintiff was injured in the course of his employment in 1962 when he was still aged fifteen years, and he commenced his action within a few weeks of attaining his majority but almost six years after the accident. His claim would be statute barred under the Law Reform (Limitation of Actions) Act 1954 after three years unless he could bring himself within section 22 (2) (*b*) by showing that at the time of the accident he was not in the custody of a parent.

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[32] It is understood that the union has lodged an appeal. The T.U.C. appears also to be concerned about an award which is probably about five times greater than the damages eventually settled in *Bonsor's* case.

[1] See *e.g. Doe* d. *Durore* v. *Jones*, 100 E.R. 1031, where they are described as "Statutes of repose." The Report of the Committee on Limitation of Actions in Cases of Personal Injury (1962, Cmnd. 1829) at para. 17 stated, "The law is intended to ensure that a person may with confidence feel that after a given time he may treat as being finally closed an incident which might have led to a claim against him."

[2] Thus shortly after the introduction of the modern principles of limitation by the Statute of Limitations of 1623 the court held that nothing could interrupt the limitation period once it had commenced, not even the closure of the courts because of civil war, *Benyon* v. *Evelyn* [1664) 124 E.R. 614; *Prideaux* v. *Webber* (1661) 83 E.R. 282. The Acts themselves contained exceptions some of which have survived into modern legislation, other exceptions were the product of the courts *e.g.* the plea of acknowledgment, see *A. Court* v. *Cross* (1825) 4 L.J.(o.s.)C.P. 79, 81.

[3] *Hewer* v. *Bryant* [1969] 3 All E.R. 578 (C.A.); *Kirby* v. *Leather* [1965] 2 Q.B. 367 (C.A.).

[4] *Lucy* v. *W. T. Henleys Telegraph Works Co. Ltd.* [1969] 3 All E.R. 456 (C.A.).

[5] [1969] 3 All E.R. 578. S. 22 (2) (*b*) of the 1939 Act (as amended by the Law Reform (Limitations of Actions) Act 1954, s. 2 (2)) provides that the extension of the limitation period in favour of a person under a disability "shall not apply unless the plaintiff proves that the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent."

The same words arose for interpretation in *Kirby* v. *Leather*[6] where the plaintiff was aged twenty-four at the time of the accident in question as a result of which he suffered severe mental damage so that he was incapable of bringing an action on his own behalf. At that time he was a skilled craftsman and was the main breadwinner for his mother and family. Ultimately more than four years after the accident and after the basic limitation period expired, he commenced the action and was forced to rely upon section 22 (2) (*b*).

The words " in the custody of a parent " have been subjected to a variety of interpretations. In *Kirby* v. *Leather*[6] the Court of Appeal found it difficult to apply in relation to a grown man or woman over twenty-one years of age,[7] although Danckwerts L.J. thought that " the draftsman must have had in mind the case of a harmless imbecile or mongol who could be expected to be actually in the custody of his parents."[8] They had no difficulty in holding that a plaintiff of twenty-four and the main financial support of his sole surviving parent was not in her custody. This treatment of " custody " as being a purely factual question was also applied by Melford Stevenson J. in *Brook* v. *Hoar*[9] where he said, " I do not think that any of these disabilities[10] support the view that there is a status or condition of custody from which the infant cannot escape until he is twenty-one. I, therefore, come to the conclusion that the question whether an infant is in the custody of a parent is a question of fact."[11] However, Donaldson J. in *Duncan* v. *Lambeth Borough Council*[12] held that in this context " custody " meant that the relationship between the parent and the claimant were such that the average reasonable parent could be expected to take action to prosecute or assist in the prosecution of the claim.[13] Finally, in *Hewer* v. *Bryant* itself, at first instance,[14] Paull J. accepted the argument that "custody" meant legal rights to control the conduct and education of a child[15] and for these purposes a child was in the custody of his father until he attained his majority.

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[6] [1965] 2 Q.B. 367 (C.A.); [1966] 1 W.L.R. 1489 (H.L.).

[7] Presumably after January 1, 1970 this age is reduced to 18 years of age, since the Family Law Reform Act 1969, by reducing the age of majority to that age, now enables a person between 18 and 21 to commence an action in his own name.

[8] [1965] 2 Q.B. 367 at p. 386.

[9] [1967] 3 All E.R. 395.

[10] Referring to counsel's argument that because an infant needs parental consent to marry, or to obtain a passport and because he lacks contractual capacity he must therefore be in parental custody until he attains his majority.

[11] [1967] 3 All E.R. at p. 398 C–D.

[12] [1968] 1 Q.B. 747.

[13] *Ibid.* at p. 762. In connection with this view it is perhaps notable that s. 22 (2) (*b*) requires the custody to exist at the time that the cause of action accrued, that is at the time of the accident and consequent injuries. It appears to be wholly irrelevant that the claimant is taken into care immediately after the

The Court of Appeal in *Hewer* v. *Bryant* without hesitation rejected the view of Paull J. and such a view, being based upon Victorian middle class concepts of the family, bears little relation to the social realities of the modern family where from school-leaving age a child is very soon economically independent of his parents, and would certainly resent most strongly any attempt by his parents to control his activities. Moreover, to hold that "custody" has this meaning would render the provision redundant since every infant would by law be in the custody of someone until he attained the age of majority.

All three judges were agreed that the essence of "custody" for these purposes was the factual relationship between the child and the parent. For Lord Denning M.R. this appears to have been sufficient since "custody" meant "in the effective care and control of a parent at the time of the accident. I stress the word 'effective' because I am firmly of opinion that Parliament must have had in mind a parent so circumstanced that it can be confidently expected that he will take whatever action is necessary or desirable on behalf of the infant."[16] Sachs and Karminski L.JJ. also required there to be effective exercise of parental powers, but, in addition, they stated that there must be a right to exercise those powers. Thus Karminski L.J. said "Physical possession is only one aspect of custody. Other important aspects include the governing power to decide the child's religion and education. But all the rights to custody may be surrendered, often for the good of the infant. Further, custody may be terminated by an order of the court and given to another; or if circumstances require it, simply allowed to lapse."[17] Thus it seems that as an absolute minimum there must in fact be control exercised over the infant, since non-exercise of control will be evidence that the infant is

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accident by someone who is likely to safeguard his interests and bring any necessary proceedings. It would be more sensible for the extension to be based upon custody between the accrual of the cause of action and the issue of the writ. Such a provision would perhaps be a little more meaningful in the case of an adult becoming insane as in *Kirby* v. *Leather* [1965] 2 Q.B. 867. See also Donaldson J. in *Duncan* at p. 764. However, it is asking a great deal of a parent to act as a next friend since he is personally liable for any costs incurred, with a right of indemnity against the infant, *Sleeden* v. *Walden* [1910] 2 Ch. 393; but in assessing contribution for legal aid purposes it is the means of the next friend, not those of the infant, that are considered, so that the infant is frequently liable for a higher contribution than his own means would require.

[14] [1969] 1 All E.R. 13.

[15] See *e.g. Re Agar Ellis* (1883) 24 Ch.D. 317, 326 *per* Brett M.R., and 330 *per* Cotton L.J.

[16] [1969] 3 All E.R. at p. 582 G–H.

[17] *Ibid.* at p. 583 C–D; see also P. 586 H–I.

emancipated from parental control. In addition, it may be necessary to show that such control is exercised by a person entitled by law to do so. However, should this latter requirement ultimately be held necessary it does leave open the question of custody of a mental patient over the age of majority. Since parental rights cease at that age, the result is either that the word " custody " has a different meaning in these two cases (although the word is used only once) or an adult mental patient can never be in parental custody, perhaps unless he was insane from infancy, so that this provision is virtually redundant. In this case, in spite of the fact that the parents had taken legal advice and at one stage attempted to bring proceedings, the plaintiff succeeded since he was not in their custody at the time of the accident, having left home and was earning his living—although after the accident he returned to his parents who took great care to protect his interests.

In *Hilton* v. *Sutton Steam Laundry* [18] Lord Greene M.R. stated, "The Statute of Limitations is not concerned with merits. Once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the Statute of Limitations is entitled, of course, to insist on his strict rights." This general principle that once a cause of action has accrued and the time limit has expired the prospective plaintiff is without a remedy, despite the fact he was unaware that any cause of action had accrued,[19] is now subject to exceptions permitting the court in its restricted discretion to extend the limitation period.[20] The decision in *Cartledge* v. *E. Jopling & Sons* [21] led to the Limitation Act 1963 which allows the court to extend the period where the prospective plaintiff can show that material facts relating to the cause of action included facts of a decisive character outside his actual or constructive knowledge until a date outside the limitation period.[22] In *Lucy* v.

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[18] [1946] 1 K.B. 65, 73 (C.A.).

[19] See *e.g.*, *Howell* v. *Young* (1826) 108 E.R. 97; *Bagot* v. *Stevens Scanlan & Co.* [1966] 1 Q.B. 197 (C.A.); *Granger* v. *George* (1826) 108 E.R. 58. Lord Denning M.R. in *Building and Civil Engineers Holiday Scheme Management Ltd.* v. *Post Office* [1966] 1 Q.B. 247, 263, described such a situation as absurd.

[20] See *e.g.* Arbitration Act 1950, s. 27; Maritime Conventions Act 1911, s. 8; Family Provision Act 1966, s. 5. Formerly s. 14 (1) of the Workmen's Compensation Act 1925 also contained a discretionary power to extend. It is perhaps instructive to compare the approach of English judges under those Acts with that of their New Zealand counterparts under the Limitation Act 1950, s. 4 (7) and the Workers' Compensation Act 1922, s. 27 (4) in cases such as *Petrie* v. *Ashburton Electric Power and Gas Board* [1961] N.Z.L.R. 762, *McKenzie* v. *Booth* [1967] N.Z.L.R. 151, and *Watt* v. *Greenwood* [1955] N.Z.L.R. 413. The Law Reform Committee Report (Cmd. 5334) at para. 7 rejecting a discretionary period of limitation is somewhat unconvincing in the light of the New Zealand experience, and of the fact that Courts of Equity applied a flexible doctrine of laches to this problem.

[21] [1963] A.C. 758.

[22] In *Goodchild* v. *Greatness Timber Co. Ltd.* [1968] 2 All E.R. 255 it was stated this meant that the plaintiff as a reasonable man would have thought that he had a worthwhile action; *cf.* *Brazier* v. *Ministry of Defence* [1965]

Henleys[23] the court was faced with the question whether this right was restricted by the terms of section 3 (4), which provides that any action arising out of the death of a person which survives or arises by virtue of the Fatal Accidents Acts or the Law Reform (Miscellaneous Provisions) Act 1934, must be brought within one year after that person's death.

In this case the applicant's husband had died over four years previously as a result of cancer which must have been contracted some fourteen years prior to his death whilst working for the defendants. The applicant sought leave to bring an action against I.C.I. as manufacturers of the chemicals the handling of which had caused the cancer. All judges were agreed that this application must fail since section 3 (4) automatically terminated the right to sue on the expiration of one year from the death. This provision, of course, will lead to anomalous results. If the plaintiff's husband were still alive he could make an application to the court for leave, and he would succeed if he could show that previously he had been unaware that he was suffering from cancer, and various claimants were permitted to bring I.C.I. into their actions.[24] Nevertheless, his widow failed despite the fact that her needs were now greater.

Alternatively, the widow claimed to join I.C.I. as a defendant to the existing action. This claim was rejected by a majority of the Court of Appeal (Lord Denning M.R. dissenting) on the ground that the Courts have always refused to allow the joinder of a party if this would defeat his acquired rights under the Statutes of Limitations.[25] This appears to be part of a general principle which is also illustrated by the refusal of the court to extend the validity of a writ where it has not been served and the limitation period has expired.[26] This is an interesting piece of circular reasoning because the defence under the Act is available only if the court refuses to exercise its discretion in favour of the plaintiff, and to argue that the discretion cannot be exercised in favour of the

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1 Ll.L.R. 28. See also *Re Clarke* v. *Forbes Stuart (Thames Street) Ltd.* [1964] 1 W.L.R. 836 (C.A.); *Pickles* v. *National Coal Board* [1968] 2 All E.R. 598 (C.A.). On the question of actual or constructive knowledge see *Newton* v. *Cammell Laird* [1969] 1 All E.R. 708 (C.A.).

[23] [1969] 3 All E.R. 456. It is perhaps notable that in *Hewer* v. *Bryant* an application by the plaintiff's parents under the 1963 Act failed, although the plaintiff himself was not statute barred and therefore could sue!

[24] See p. 462 B–C.

[25] See e.g., *Mabro* v. *Eagle Star and British Dominions Insurance Co. Ltd.* [1932] 1 K.B. 485.

[26] See R.S.C., Ord. 6, r. 8; *Heaven* v. *Road and Rail Wagons Ltd.* [1965] 2 Q.B. 355; see also *Baker* v. *Bowkett Cakes* [1966] 1 W.L.R. 861; *Stevens* v. *Services* [1967] 1 Q.B. 359. *Cf.* R.S.C., Ord. 20, r. 5, which permits amendment to include joinder of a new cause of action in spite of the expiration of the limitation period. Presumably here the defendant is not taken by surprise. The suggestion of Lord Denning M.R.'s *Chatsworth Investments Ltd.* v. *Cussen's (Contractors) Ltd.* [1969] 1 All E.R. 143, 145, that this has introduced a loosening of the old rules, has been strongly rejected in *Braniff* v. *Holland & Hannen and Cubitts (Southern) Ltd.* [1969] 3 All E.R. 959 (C.A.).

plaintiff because it would deprive the defendant of his defence under the Acts is to approach the problem from the wrong end. This appears to have been the view of Lord Denning M.R. who, however, based his argument on a strained interpretation of section 3 (4). This, he claimed, merely required an action to be started within one year and thereafter the court, in its discretion, could join parties. There is little other than a sense of injustice to support such an interpretation. The fault lies basically in the policies of the Limitation Acts which are to punish plaintiffs for delay and to protect defendants from stale claims. In protecting defendants we should not lose sight of the interests of injured plaintiffs. It is probably a more just approach to ask whether in fact the defendant will be prejudiced by the suit after such a long delay. Has he in fact lost his witnesses or evidence? This is also a problem which can prejudice a plaintiff.[27] The defendant is not necessarily taken by surprise by a writ out of the blue many years later since there are frequently detailed negotiations commencing shortly after the accident, and a defendant employer for safety purposes may well have kept detailed records of the incidents. The whole policy of the limitations of actions is in need of review, as the strange results of these cases show.

R. S. NOCK.

JUDGMENTS AS EVIDENCE

Stupple v. *Royal Insurance Co. Ltd.*[1] is the first case to raise difficulties in the application of section 11 of the Civil Evidence Act 1968, which has abolished the rule in *Hollington* v. *Hewthorn & Co. Ltd.*[2] whereby a criminal conviction was not evidence of guilt in a civil court. By section 11 (2) (*a*), proof of a person's conviction of an offence is now admissible in evidence, and "he shall be taken to have committed that offence unless the contrary is proved." The onus of proving innocence of the crime thus rests upon the party so alleging, an onus which, as recently reiterated by the Privy Council in *Public Prosecutor* v. *Yuvaraj*,[3] is to be discharged upon a preponderance of probabilities.

In *Stupple*, S had been convicted six years before of participating in a bank robbery, and the jury's verdict had been upheld by the Court of Appeal. The present case concerned cross-actions between him and the insurer of the victim bank: S was laying claim to the banknotes found in his flat at the time of his arrest (an order having been made under the Police (Property) Act 1897 awarding them to the insurance company), and the insurance company was claiming reimbursement of the moneys that they had paid to the insured bank. It was therefore relevant to determine whether, for the purposes of this litigation, S had been guilty of the robbery, and the onus of proving that he was innocent was clearly upon S by virtue of section 11 (2) (*a*).[4]

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[27] See *e.g.*, *White* v. *Arthur Nicol Ltd.* [1966] N.Z.L.R. 645 where the plaintiff had forgotten the date of the accident; *The Sauria and The Trent* [1957] 1 Ll.L.R. 396, 407.

[1] [1970] 2 W.L.R. 124; [1970] 1 All E.R. 390.

[2] [1943] 1 K.B. 587; [1943] 2 All E.R. 35 (C.A.).

[3] [1970] 2 W.L.R. 226, 231, P.C., *per* Lord Diplock.

Paull J. held that the effect of the Civil Evidence Act was to make not only the bare fact of the conviction evidence, but that, under section 2, the evidence given in the criminal trial could also be considered. He went on to phrase the problem before him as follows [5]:

> " . . . is one entitled to sit as a sort of court of appeal upon the decision of the Court of Appeal Criminal Division? If a jury has found a man guilty, and the Court of Appeal has considered the matter and upheld the verdict as being a reasonable verdict, is one entitled to say that the probability is that the man, after all, was not guilty; or can one only come to that conclusion if there is some new and striking evidence in his favour which one feels would have altered the decision of the Court of Appeal? If so, would not the proper step be to see that the matter was referred to that court for its decision?"

After reviewing the evidence before him, the judge conceded that had he himself been sitting as a juryman he would not have been satisfied that S had been guilty of robbery; but he concluded [6]:

> " I feel, however, . . . that this matter is essentially a jury matter and has really been disposed of by the Court of Criminal Appeal. Whether possession of stolen goods soon after a robbery is proof of complicity in the robbery or proof of receiving stolen goods has always been considered essentially a matter for the jury and not for a lawyer. . . . The Court of Criminal Appeal considered the evidence given at the trial which is, certainly in all its essentials, the evidence that I have heard, and they considered that there was evidence which enabled the jury, who had been properly directed, to be sure that Mr. Stupple was one of the robbers. Have I any right, in effect, to overrule the Court of Appeal? I do not think I have any such right merely because I differ from the jury on an inference which is essentially one for the jury to draw. This is a case where I feel that the weight of the fact that he has been convicted and that the conviction has been upheld by the Court of Criminal Appeal must be taken from a practical point of view to be conclusive."

It is submitted that although the finding of guilt is left to the jury in criminal trials, this is not necessarily to be regarded as a factor of overriding weight in civil litigation. Further, that S's conviction had been upheld by the Court of Appeal did not necessarily add such overriding weight, since the Court of Appeal will quash the conviction only if it thinks that the verdict of the jury is "unsafe or unsatisfactory."[7] Indeed, the members of the Court of Appeal may well have upheld the conviction although they themselves might not have drawn the same conclusion as did the jury.[8] This is a consideration of particular importance where, as here, guilt was apparently not proved by direct evidence in the criminal trial, but depended upon the drawing of inferences from circumstantial evidence. The civil court was thus in as good a position to draw inferences as had been the jury in the criminal trial, since the Court of Appeal would have considered only whether there was evidence from which the inference could reasonably have been drawn.

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[4] Paull J. pointed out (at p. 135) that the onus would have been on S also by virtue of the Police (Property) Act 1897.

[5] [1970] 2 W.L.R. at p. 128.

[6] *Ibid.* at p. 135.

It is arguable that S had to establish his claim to the banknotes upon a balance of probabilities, *i.e.* upon no heavier a burden than he would have had to bear in any other civil action. The civil court is not relieved by section 11 of the judicial function that it itself be satisfied upon the issues. Paull J. professed himself conscious of a reasonable doubt as to S's guilt, but this was not the inquiry. It is submitted that the learned judge's attention should rather have been directed solely to whether *he* in his judicial capacity was satisfied of S's innocence upon a balance of probabilities (though the result in the circumstances of the particular case might well have been no different). After all, section 11 merely makes the conviction *evidence* in a subsequent civil case. The civil court is still required to exercise its own judgment as to whether the inference of innocence is not the more probable one. The approach of Paull J. is open to criticism both because it results in the conviction being treated as conclusive unless fresh evidence can be produced, and because it amounts to an abdication by the civil court of its own judicial function.

JEAN CAMPBELL.

THE DESERTED VILLAGE

NOT unlike the human appendix, the presumption of a general hiring has survived as a troublesome excrescence on the body of our law of master and servant. "If a master," said Best C.J., "hire a servant, without mention of time, that is a general hiring for a year."[1] In the long era of statutory control which followed the Black Death,[2] the yearly hiring conduced to stability in the master-servant relationship as well as being geared to "the revolution of the respective seasons" upon which agriculture depends.[3]

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[7] s. 2 (1) of the Criminal Appeal Act 1968, replacing s. 4 (1) of the Criminal Appeal Act 1907 ("unreasonable or cannot be supported having regard to the evidence") which would have governed S's appeal from his conviction.

[8] *R.* v. *Simpson* (1909) 2 Cr.App.R. 128.

[1] *Beeston* v. *Collyer* (1827) 4 Bing. 309, 311.

[2] Statute of Labourers beg. 23 Ed. III, c. 1; see prohibition on hirings for less than a year in 5 Eliz.1,c.4, which, however, provided for notice.

The presumption became increasingly irrelevant in the face of the new nineteenth-century industrialism which with its vicissitudes and mobility was, as the Webbs showed,[4] hostile to long-term engagements. Nor were the trade unions averse to the abolition of the "yearly bond" which tended to weaken their "control of the job." Certainly, the presumption put a premium on good behaviour as far as the servant was concerned. Thus, the servant who refused to work late in the harvest field because strong beer of good quality had not been brought to him (his customary due he, mistakenly, thought) and the servant who declined to take the horses to the marshes, his dinner then being ready, were both held to have been rightly dismissed, thereby forgoing all claim for wages for the period before the dismissal and, of course, for the remainder of the hire.[5]

The longevity of the presumption seems to have disturbed certain judges who possibly would have agreed with Ehrlich's thesis that "the centre of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision but in society itself." [6] As Branson J. later put it: "When you are dealing with agreements which are not agreements between agricultural labourers and their employers, there is not the same kind of reason for treating the agreement as a yearly hiring, but rather the contrary." [7]

Nevertheless, the presumption was applied to non-agricultural callings, such as the clerk to the army agent, the buyer's assistant, the coal-owner's servant running a "tommy shop," the sales manager, the warehouseman, the engineer and the horsekeeper.[8] Few would argue with du Parcq L.J.'s assertion that the continued existence of the presumption "would probably surprise a good many people," [9] although it was clear that the presumption might be displaced by custom, such as that applicable to domestic servants or, as has been suggested, to modern industrial hirings. Where custom was silent, the courts, "sometimes rather eagerly," [10] would cast around for evidence to rebut the presumption such as payment by the piece, payment at intervals shorter than a year or a hiring at will. Despite Lord Oaksey's *obiter dictum* in *McClelland* v. *Northern Ireland General Health Services Board* that "a general hiring without more is terminable on reasonable notice,"[11] the balance of authority appeared to support the view that a requirement of notice would prima facie negative a general hiring.

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[3] I, *Blackstone's Commentaries*, 425; also Co.Litt., 42(b).

[4] *Industrial Democracy* (1897), p. 431.

[5] Respectively *Lilley* v. *Elwin* (1848) 11 Q.B. 742, and *Spain* v. *Arnott* (1817) 2 Stark. 256. If the dismissal was wrongful, the courts, after toying with the notion of "constructive service" supporting a claim in *indebitatus assumpsit* for the remainder of the term, came down on the side of the servant's duty to mitigate loss by seeking new employment.

[6] Foreword to *Fundamental Principles of Sociology of Law* (transl. Walter L. Moll). See Pollock C.B. in *Fairman* v. *Oakford* (1860) 5 H. & N. 635, 636, and Greer L.J. in *De Stempel* v. *Dunkels* [1938] 1 All E.R. 238, 246.

[7] *Fisher* v. *W. B. Dick & Co. Ltd.* [1938] 4 All E.R. 467, 469.

[8] Respectively, *Beeston* (note 1, *supra*); *Jackson* v. *Hayes Candy & Co.* [1938] 4 All E.R. 587; *Davis* v. *Marshal* (1861) 4 L.T. 216; *Cayme* v. *Allan Jones & Co.* (1919) 35 T.L.R. 458 (*cf. Fisher*, note 7, *supra*); *Fawcett* v. *Cash* (1834) 5 B. & Ad. 904; *Buckingham* v. *Surrey Canal Co.* (1882) 46 L.T. 885 (doubted in *De Stempel*, note 6, *supra*); *R.* v. *St. Andrew, Pershore* (1828) 8 B. & C. 679.

[9] *Jackson* (note 8, *supra*), at p. 589.

[10] S.C. at p. 589.

How is it that the law has lagged behind social change to a greater than normal degree in this instance? A possible, and perhaps remote, reason is the supposedly English attachment to the Arcadian idyll of the sort described by Goldsmith when he inveighed against the effects of the Enclosures on "Sweet Auburn"[12]:

"But times are altered; trade's unfeeling train
Usurp the land and dispossess the swain"—lamented poor Noll.

At a more prosaic level, the presumption coincided with the requirement of a yearly service under the Poor Laws (necessary for a settlement) and also with the requirement in section 4 of the Statute of Frauds 1677 of a memorandum in respect of any agreement not to be performed within the space of one year from the making thereof.

At long last the Court of Appeal has, in a free-finding of law exercise, brought part of our labour law into the twentieth century. "The time has now come," said Lord Denning M.R. in *Richardson* v. *Koefod*,[13] "to state explicitly that there is no presumption of a yearly hiring. In the absence of express stipulation, the rule is that every contract of service is determinable by reasonable notice." Edmund Davies and Fenton Atkinson L.JJ. agreed that the radical change in our society had rendered the presumption inapplicable. The case itself, which concerned the notice due to a café manageress, is of little legal interest save that it marks the end of a long, rustic saga. Perhaps the saddest postscript of all is the invasion of the *sanctum sanctorum* of agriculture itself in which the rites of the May hirings are being replaced by modern, short-term contracts terminable by notice.[14]

CHARLES DRAKE.

THE UNCERTAINTY OF SPECIAL POWERS

WHILST there have been hopeful signs recently of the courts increasing their vigilance over administrative action[1] *McEldowney* v.

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[11] [1957] 1 W.L.R. 594, 599.

[12] *The Deserted Village.* Thomas Hardy's village hoydens and passionate swains gave the lie to pastoral simplicity.

[13] [1969] 1 W.L.R. 1812; [1969] 3 All E.R. 1264. The reference to termination by notice *per* the Contracts of Employment Act 1963 in the appellant's contract of employment would have negatived the presumption had it applied.

[14] A process which has, perhaps, been hastened by the need to give the statutory particulars under s. 4 of the 1963 Act.

[1] See *e.g. Re H. K.* (*An Infant*) [1967] 2 W.L.R. 926; *Padfield* v. *Minister of Agriculture* [1968] 2 W.L.R. 924; *Conway* v. *Rimmer* [1968] 2 W.L.R. 998. But see Mr. Hepple's comments on the subsequent history of *Re H. K.* (1969) 32 M.L.R. 668.

Forde[2] shows that it will be an uphill struggle to bring the same vigilance to delegated legislation. In particular the case illustrates the problems of applying the tests of unreasonableness or uncertainty to ministerial regulations. On a wider basis it highlights two general failings in our administrative law.

By section 1 (3) of the Civil Authorities (Special Powers) Act 1922 of Northern Ireland, the Minister of Home Affairs was given power to make regulations "for making further provision for the preservation of peace and maintenance of order." One of the regulations so made provided that it should be an offence to be a member of an unlawful association or in any way to support its activities. No definition of an unlawful association was given, but eight organisations were named in the regulation and were thereby deemed unlawful, *e.g.* the Irish Republican Army. This evidently proved insufficient to check the growth of subversive organisations and in 1967 the list was amended to include: "The organisations at the date of this regulation or at any time thereafter describing themselves as 'republican clubs' or any like organisation howsoever described." McEldowney was a member of the Slaughtneil Republican Club and was charged with an offence under the regulations. When the case reached the House of Lords the outstanding question was whether the addition of 1967 was "too vague and so arbitrary as to be wholly unreasonable"[3] and *ultra vires* the Act. By a majority (Lord Pearce and Lord Diplock dissenting) the House found it was not. It is submitted, though, that the conclusion of the minority is to be preferred.

The enabling power was not of the type which gave the Minister a discretion to make such regulations as he thought fit. Thus the test of the legality of the regulations was not whether the Minister had honestly formed an opinion that they were necessary for the preservation of peace and maintenance of order, but whether in the court's opinion they would have the effect of securing these objectives. In the absence of a definition of an unlawful association[4] the court would have to decide as best it could whether any proscription would further the preservation of peace and maintenance of order. No problem arose with the organisations listed by name because the court took judicial notice of their notoriously subversive nature but no such approach was possible with the organisations apparently caught by the 1967 amendment. Faced with this situation Lord Hodson and Lord Guest said the court ought to accept the Minister's judgment that the regulation would achieve the statutory objectives,[5] and Lord Pearson in effect rewrote the regulation so that it reflected what he thought it ought to have provided, and included a definition of an unlawful association.[6] With respect it seems that their Lordships were doing the Minister's work for him; they fairly attract the label "executive minded." If the regulation could not have been applied as it stood it ought to have been quashed, not judicially rewritten. Further, the approach of Lords Hodson and Guest interprets the statute as though it said the Minister may make such regulations as he thought necessary for preserving the peace and maintaining order, whereas it plainly did not.[7]

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[2] [1969] 3 W.L.R. 179.

[3] *Per* Lord Hodson, *ibid.* at p. 186. The case raised other points of statutory interpretation which are not noted here.

[4] It was omitted in favour of the list of associations deemed to be unlawful, thus obviating the need in each case to prove that an impugned association was unlawful either by its objects or activities.

Lord Hodson also considered that the two clauses of the amendment could be severed and separately construed, so that, as the Slaughtneil Club was caught by the first clause banning organisations called "republican clubs," the court was spared the task of construing the second clause. This is judicial timidity of a high order; the two clauses are obviously interdependent and should be construed as a whole.

Adopting this approach Lord Pearce and Lord Diplock found that attempts at construction led to absurdity. As Lord Pearce said, the regulation was vague and ambiguous [8]:

> "A man ought not to be put in peril on an ambiguity under the criminal law. . . . Had the final phrase 'or any like organisation howsoever described' been absent, the regulation would simply have been an attack on the description 'republican club' however innocent the club's activities.[9] But the final phrase shows that this is more than an attack on nomenclature, since the club is deemed equally unlawful if it is a like organisation, whatever be the name under which it goes. And what is the 'likeness' to a republican club which makes an organisation unlawful 'howsoever described?' Since a republican club is banned whatever may be its activities, the likeness cannot consist in its activities. And since the organisation is unlawful, howsoever described, the likeness cannot consist in a likeness of nomenclature. The only possibility left seems to be that the 'likeness' may consist in the mere fact of being a club. In which case all clubs, however named, are unlawful—which is absurd."

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[5] [1969] 3 W.L.R. at pp. 188 and 192 respectively.

[6] *Ibid.* at p. 198.

[7] Lord Hodson, in fact recognised the absence of such subjective provisions, *ibid.* at p. 186, *cf.* Lord Diplock's analysis at pp. 199 and 201, and *per* Lord Pearce at p. 194: "It is argued that it is for the Minister alone to decide how he should use his power. . . . But in my opinion . . . [the court] cannot take the easy course of 'passing by on the other side.' . . . The fact that this is not an easy line to draw is no reason why the courts should give up the task and abandon their duty to protect the citizen."

[8] [1969] 3 W.L.R. at p. 195. See *per* Lord Diplock to the same effect, *ibid.* at pp. 205 and 206.

[9] He did not accept, though, that this would have been a legitimate use of the Minister's power.

The analysis of the minority brings out plainly the uncertainty in the regulation, but whatever hope there may have been that the courts would be astute to condemn badly drafted legislation is surely dashed by the attitude of the majority. The approach of benevolent construction clearly ought to have limits, particularly in the criminal law. It may have been inconvenient, but probably the only satisfactory way for the Minister to proceed would be to define a republican club, or make further specific additions to the list of proscribed organisations.

This lack of proper concern for the quality of drafting in subordinate legislation is the first failing of our administrative law highlighted by this case. The courts' role here must have a positive aspect, namely, the promotion of standards of good administration. The duty to act fairly enunciated in *Re H. K. (An Infant)* [10] was a beginning in one aspect of administration; attention to drafting and a refusal to put up with bad drafting is another obvious line of attack. The second failing highlighted by the case is the failure of our administrative remedies to deal with the real issue in a complaint. In all probability McEldowney's grievance was about oppressive police action. This was the first prosecution under the 1967 amendment and was a case where the police admitted they knew of nothing seditious about the Slaughtneil Club. An application for an archaic prerogative order or an appeal on a point of law are not sufficient substitutes for an effective judicial remedy to control the arbitrary or capricious use of discretionary powers.

PETER SILLS.

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[10] [1967] 2 W.L.R. 996.

REVIEWS

HISTORICAL FOUNDATIONS OF THE COMMON LAW. By S. F. C. MILSOM, F.B.A. [London: Butterworths. 1969. xiv and 429 and 87 (tables and index) pp. 44s. net (Paperback) and 60s. net (Hardback).]

THE common law system is one of the two great systems of legal thought evolved by European civilisation. In this book Professor Milsom sets out to discuss two basic questions about this system. He formulates these as, first, "what starts a legal system off, what causes customs to turn into reasoned law?" and secondly, "how has it been so versatile and so durable? How can a system of law, a system of ideas whose hypothesis it is that rules are constant, adapt itself to a changing world?" These two questions, which could of course be asked of any sophisticated legal system, form the framework within which Professor Milsom aims to give "a single picture of the development of the common law, to draw the main outlines of the subject." The specific topics which are discussed in varying degrees of detail are familiar; seisin, uses, trespass and case, assumpsit, *Slade's* case, and all the standard headings are included. A mere perusal of the table of contents would suggest that the book contained the mixture as before, offering a rather more concise *Concise History of the Common Law*. As such, coming from a scholar of Professor Milsom's standing, it would be a valued work by all those who are interested in the history of English law, for one could be sure that he would have something interesting to say upon even the most worn subjects. *Historical Foundations of the Common Law* is designed, however, to relate the discussion to central issues in common law legal history; the aim is to provide at least a partial answer to the two general questions which are posed in the introduction. The attempt, and the degree to which it is successful, gives the book a unity and an interest to all students of the common law which no mere short history could achieve.

His first question is given an answer in terms of the history of legal institutions and procedure. The centralisation of justice made possible and gave rise to a cohesive profession of the law; the evolution of a certain sort of legal procedure put the professionals into a position in which legal reasoning and analysis became both possible and necessary. This thesis is worked out in detail with great elegance, and the argument is not one which can be summarised. The account given of the relationship between the evolution of substantive law and the evolution of procedure, a theme which recurs throughout the book, is remarkably well done.

The account of the rise of the legal profession, and the literature of the profession, is by comparison less interesting, being less fully treated. Both the emergence and the survival of the common law system are intimately bound up with the history of the legal profession and the literature its members produced. But here much original work remains to be done; until it is done many questions about the legal profession must remain unanswered.

The discussion of the second question occupies the major part of the book, in which Professor Milsom discusses in detail the way in which various branches of the common law were adapted and manipulated by the lawyers over the course of the centuries; the message is that the common law survived because it was, somehow or other, kept more or less in line with what was needed, and this more by accident than design. Here Professor Milsom's general thesis is perhaps most clearly set out in the following passages:

"The life of the common law has been in the unceasing abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property. If the rules of contract give what now seems an unjust answer, try tort. Your counterfeit will look off to one brought up on categories of Roman origin; but it will work." To put it rather differently, the categories of the common law remained fluid, and the dominant method of change consisted in perpetual reclassification. The tortuous steps involved in the process might lead to a complete reversal of a rule of law. "Even when [such a rule] is formally abolished or finally forgotten, its shape will be seen in the twisting route by which it was circumvented." This general thesis is worked out and illustrated in great detail, with a fascinating command of the materials. No lawyer who wishes to understand the process of change in the common law system can neglect the account which Professor Milsom gives of the mechanism by which it was brought about.

There are, however, some curious gaps in the story. Most striking is the absence of any general discussion of the place of authority, and precedent in particular, in the evolution of the common law; to what extent can the history of legal change be seen in terms of a conflict between reason and authority? Closely connected with this topic is the question of the role played by the judiciary in legal change—to what extent have judges and courts, at certain periods consciously, set about to modify the law, and to what extent have they merely been pushed one way or the other by counsel, with no clear conception of where, if anywhere, they were going? Professor Milsom also, perhaps, says too little about change by statute, and its relationship to internal change. It is true that before the nineteenth century legislation on private law has, for long periods, been uncommon. Even since the passion for legislation took hold, the law of contract and the law of tort have been little affected by it. It is a question to what extent it is true that in modern times legislative activity has, as it were, saved the common law system from extinction, or to what extent legislative reform of the common law (for example, the 1925 property legislation) is best regarded as a mere offshoot of the system.

At a more general level it seems plain that the endurance of the common law is only partially explained by the mechanisms of internal change; its survival and spread depend to a considerable and obvious extent upon political facts. With explanation at this level Professor Milsom's book is not, of course, concerned. The fact, however, that (for example) West African countries, possessing as they do very different social systems, can get along on virtually the same law of contract as ourselves, at least in a formal sense, prompts the speculation that there is a tendency to think that the substantive rules of law matter more than they in fact do. Would life be much different if *Rylands* v. *Fletcher* had never been decided, or *Eastwood* v. *Kenyon* gone the other way? Or, shocking though it may seem, if *Donoghue* v. *Stevenson* were suddenly to be rejected? I myself have never personally met anyone who has utilised that great decision. It could be that, given certain political conditions, it does not make very much difference to its survival whether the law is kept in touch with the times; at least the point is worth some attention.

It is perhaps needless to say that Professor Milsom's style and presentation make this an absorbing book to read; the writing has a certain Tacitean character, and abounds with sentences which are both memorable and illuminating. Such as these: "Negligence as 'a' tort seems to be the result of an accident of classification." "The settlement of wealth has been perhaps the most distinctive contribution of the common law to legal achievement." "The miserable history of crime in England can be shortly told. Nothing worth-while was created. There is no achievement to trace." Here indeed is a happy hunting ground for examiners in legal history. Those, however, whose main interest lies in modern law will find much to interest them in this book, which deserves the success it will surely enjoy.

A. W. B. SIMPSON

THE JUSTICE OF THE PEACE. By ESTHER MOIR. [London: Penguin Books. 1969. 205 pp. including index and notes. 6s.]

To undertake a survey of the historical development, social role and importance of the justice of the peace from medieval to modern times in a 200-page paperback is a formidable task, and inevitably there will be disagreements on the content or emphasis of such a study. This account is included in the Pelican series on British Institutions, whose aim is "not only to outline the histories of these institutions, but to relate their development to society and analyse their effect on its overall shape." Miss Moir's lively account describes the social and political role of the magistracy in the past and emphasises its importance in local government, especially in the administration of the Poor Law and related economic measures. The author seeks to place the county justices in a rather more favourable light than they appeared to the Webbs, for example, and to show that the bench did not consist just of county squires, but included commercial and professional men. Nevertheless, the commercial men had to acquire country estates before they were appointed and the professions were mainly represented by the established clergy. Little is said in favour of the borough justices.

Keeping the peace, the other main function of the magistracy, is also dealt with, though I would have liked more detail on this, especially in relation to the conduct of summary trials and how accused persons fared. The present role of the magistracy is also briefly described, and little is said about the composition of benches today. Perhaps this reflects a lack of available information. The footnotes refer us to a number of detailed studies of the past, such as the author's own work on *The Justices of the Peace in Gloucestershire 1775–1800*, but there seem to be no comparable studies on the twentieth century.

J. LEVIN.

THE TECHNIQUE OF PERSUASION. By DAVID NAPLEY. [London: Sweet & Maxwell. 1970. xii and 104 pp. 18s. net.]

TECHNIQUE IN LITIGATION. By ERIC MORRIS. [Cape Town: Juta & Co. Ltd. London: Sweet & Maxwell. 1969. xxxiii and (with index) 270 pp. £6 16s. 6d. net.]

IN a deservedly laudatory foreword to Mr. Napley's little book Melford Stevenson J. recalls that when he started at the Bar some forty years ago "the judiciary at all levels did not always exhibit the benevolent patience so characteristic of contemporary judicial figures," and prentice hands had to learn often enough from the sharpness and ferocity of judges. Certainly, there is much sound counsel to the advocate in these pages, and on occasions Mr. Napley joins issue with proponents of stock contentions. Thus a recent pamphlet by two members of the Bar, Mr. Edward Gardner Q.C., and Mr. Mark Carlisle, asserts that one of the "golden rules of the Bar" is to ask no questions at committal proceedings. Rightly, he instances some celebrated cases where such questioning was effective and he observes that such a rule needs to be observed only by those who are unfamiliar with their case and who lack the ability to cross-examine with discretion. Of cross-examination generally he notes that it is seldom of value to cross-examine down to meticulous details unless they are really vital and he deprecates the monotonous "I put to you . . . " employed by some advocates.

He provides good advice on the subject of cross-examining as to documents, and on this matter he recalls that he once saw Sir Patrick Hastings cross-examining a witness and at one moment pause and laboriously search for and produce a document and continue with it in his hand without mentioning it. The witness therefrom came out suddenly with answers favourable to Sir Patrick's case and he put the document back on the desk without having produced it. It was seen to be blank. "I make no comment," writes Mr. Napley. An anecdote nicely illustrates the danger of asking one question too many. A young barrister was defending an accused charged with the offence of having unlawful sexual intercourse with a girl under sixteen. The chief prosecution witness was a venerable farmer who was said to have seen all from an adjoining field. Counsel suggested to him that as a young man he had gone out with girls. The witness readily agreed, as he did when it was further suggested that he would sometimes walk with one in a field and then lie down with her in the grass. "Now tell us, Mr. Jorrocks, did it not sometimes occur that whilst your girl friend was lying back on the grass, you would lean across her and give her a kiss?" asked counsel. "Oi, that be roight," responded the farmer. Next came the imprudent gloss: "Do you not think that anyone observing you thus, from an adjoining field, might have thought you were having intercourse with her?" "Indeed," said the witness, and after a pause, "and what's more, they would jolly well 'ave been roight!"

Mr. Napley is good on what may be called general court manners. He is strong on the need to keep emotions under control and to avoid pomposity and he writes sensibly on such matters as the taking and marking of notes of evidence. His work is based on talks given to the Associate and Young Members of the Law Society and although aimed primarily at the beginner it can be read with profit by those who have passed out of the tyro stage.

Mr. Morris is a Senior Counsel of South Africa and although his book is more technical and detailed than Mr. Napley's it too presents a good deal of fundamental pragmatism. He discusses cross-examination and part of his advice is pithily expressed in the vernacular counsel of prudence, "When yer strike ile, stop borin', many a man has gawn on an' bored right through." He adopts Wrottesley's advice that counsel should never continue the cross-examination of a witness if the judge shows the disposition to do it himself, and he writes: "Another odd thing is that the successful throwing of cricket balls seems to tempt even the judge to have a few shies for himself." Mr. Morris's book shows that in essentials intelligent advocacy in South Africa and in the homeland is based on the same foundation.

FLORENCE O'DONOGHUE.

SALMOND ON THE LAW OF TORTS. 15th Edition by R. F. V. HEUSTON. [London: Sweet & Maxwell. 1969. cxii and 840 pp. (inc. index) Bound £4 18s. 0d. Paperback £2 10s. 0d.]

SIR John Salmond in his preface to the first edition of *Salmond on Torts* explained the purpose of the book thus: "No book is justified by the good intent of its author, but I hope that the present work will be found of use to lawyers and to students of law, as a general exposition, in modern compass, of an extensive and in some respects difficult and imperfectly developed department of our legal system."

Since 1907 there have been vast changes in the law; today tort is more extensive and a good deal more perfectly developed than it was when Sir John Salmond wrote those words, yet the intention of the author has been realised and, thanks to the excellent editorship of Professor Heuston, *Salmond on Torts* continues to be of invaluable assistance to lawyers and to students of law. This, the fifteenth edition of the book, continues to uphold the fine tradition set by Sir John Salmond, W. T. S. Stallybrass and Professor Heuston in previous editions.

The book has been extended by some twenty-seven pages and whilst most sections have been expanded some have been shortened and some have disappeared altogether (*e.g.* those sections on maintenance and champerty). The chapter on general principles of liability has been extended and some interesting facts and statistics are brought in to illustrate the purposes of and policy that lies behind the law of torts. For example, to illustrate the point that the law of torts may have an important deterrent function Professor Heuston points out the shortcomings of the criminal law by telling us that in 1966 there were 296,610 reported accidents but only 954 prosecutions and the average fine was £40 14s. Later, whilst discussing the argument that the law of torts should be abolished in so far as it attempts to give a remedy in cases of personal injuries arising out of accidents on the highway and be replaced by a system of insurance, Professor Heuston informs us that 70 per cent. of the cases decided annually in the High Court concern personal injury actions arising out of highway accidents and over 95 per cent. of personal injury cases are settled out of court. The total measurable cost of road accidents in 1965 was £246 million and the average cost of an accident is said to be £1,020. Such practical illustrations are a useful and refreshing change. The purposes of and policy behind the law of torts is all too often discussed in an academic vacuum.

It is perhaps a pity that there is not a greater "link-up" between this excellent preliminary chapter—"General Principles of Liability" and other chapters in the book. For example in the second chapter it is pointed out that whilst the nineteenth century was a period of moralisation, the beginning of the twentieth century saw the birth of "the insurance idea." However, after the insurance idea had become familiar the pendulum began to swing back again in favour of requiring proof of fault. To illustrate this last attitude passages from the judgments delivered in the House of Lords in *Read* v. *Lyons* are quoted. The rule in *Rylands* v. *Fletcher* is perhaps the tort which reflects most the changing attitudes as to the basis of tortious liability. It is these changes of attitude that alone make comprehensible the apparently contradictory interpretations of the component parts of the rule (*e.g.* as to what is a "non-natural user" or a thing that is "likely to do mischief if it escapes") and the addition of exceptions to and limitations of the rule. Thus, it would have been helpful if there had been some mention of these changing attitudes in the chapter on *Rylands* v. *Fletcher* itself, or at least a reference back to the chapter on General Principles of Liability.

As in the previous edition of the book, Professor Heuston ably brings out the fact that policy plays an important role in the law of negligence. He justifies the duty concept on the grounds that it allows the courts to limit the action of negligence and justifies their using pat formulae (such as the foresight formula) to deny liability in a particular case, rather than giving their reasons for so doing, on the grounds that this allows for greater flexibility and facilitates change where social and business conditions warrant this. Since the courts are loth to state the policy reasons that cause them to deny the existence of a duty in a particular area of law, it would have been useful had the editor outlined possible reasons for the reluctance (or otherwise) of the courts to find a duty in a particular situation; only thus can the student be aware of the areas where liability is likely to be extended or remain restricted. This Professor Heuston does in the field of negligent misstatements (in regard to misstatements generally and also in regard to barristers). Unfortunately, however, whilst concluding the section on emotional distress with the words: "The mass of confusing dicta which the cases contain is in truth due to a failure to appreciate the fundamental fact that the question cannot be answered solely by logic and that an issue of policy is involved for which the concept of reasonable foreseeability is by itself incapable of providing a solution," Professor Heuston gives no indication of the policy considerations that *are* here involved. It is true that he refers to the American case *Waube* v. *Warrington* in a footnote but perhaps he might have set out the policy analysis made in that case for the benefit of those students who have no access to American material.

The main discussion of the case of *Hughes* v. *Lord Advocate* and of *Doughty* v. *Turner Manufacturing Co. Ltd.* takes place under the section on

Standard of Care; these cases are mentioned only fleetingly in the chapter on Remoteness of Damage. This is a somewhat unconventional arrangement (the other leading text books on tort, *Street* and *Winfield*, deal with these cases solely in the sections of their books dealing with remoteness). This unusual arrangement is mentioned as a point of interest rather than as one of criticism for as Professor Heuston himself says: "There is some overlap between the concepts of standard of care and remoteness of damage each now to be judged by the standard of reasonable foreseeability." This overlap and the confusion that often results from it can clearly be seen in the case of *Doughty* v. *Turner Manufacturing Co. Ltd.* The three judgments delivered in the Court of Appeal can each be divided into two parts:

(a) In the state of knowledge as it was at the time the defendants could not reasonably foresee that immersion of the cover would cause any injury to anyone. Thus they were not negligent in immersing the cover (*i.e.* in breach of no duty of care).

(b) The defendants could foresee that by knocking something into the cauldron they would cause the cyanide to splash someone, but since the eruption that in fact resulted could not realistically be described as a variant of the foreseeable splash the plaintiff could not recover as his damage was too remote (following the *Wagon Mound*).

So in respect of the explosion risk there was no breach of duty and in respect of the splashing risk the damage was too remote. In the light of this case one may read with sympathy the oft-quoted dictum of Denning L.J. delivered in *Roe* v. *Minister of Health*:

> "The three questions duty, causation and remoteness run continuously into one another. It seems to me that they are simply three different ways of looking at one and the same question which is this: Is the consequence fairly to be regarded as within the risk created by the negligence? If so the negligent person is liable for it: but otherwise not. . . . Instead of asking three questions, I should have thought in many cases it would be simpler and better to ask the one question: Is the consequence within the risk?"

By including a discussion of *Doughty* v. *Turner Manufacturing Co. Ltd.* and *Hughes* v. *Lord Advocate* under the breach of duty section of the book as well as dealing with them under the remoteness section, Professor Heuston is surely helping to break down in the mind of the student the artificial barriers so frequently erected between the negligence and the remoteness issues—a destructive act which must be applauded!

This reviewer's major criticism of *Salmond on Torts* has always lain in the arrangement rather than the substance of the book. The arrangement has been improved to some extent by the sections on contributory negligence being included in the chapter entitled "Miscellaneous Defences" and that chapter being moved to the end of the book. In the preface Professor Heuston says that his reason for doing this is to prevent the student from becoming enmeshed in the difficulties of *volenti non fit injuria* before the elements of negligence are known. This is undoubtedly an improvement, as anyone who has hoped to explain *Wooldridge* v. *Sumner* and *Videan* v. *British Transport Commission* to a class as yet unfamiliar with the principles of negligence will agree.

Valuable as this change of arrangement may be there are still other changes which might also have been made. One piece of arrangement that this reviewer has always found particularly annoying is the separation of the Fatal Accidents Acts Provisions from the provisions of the Law Reform (Miscellaneous Provisions) Act 1934. However justifiable the separation might be on grounds of logic (it is more logical to deal with the 1934 Act under the chapter on parties and the Fatal Accidents Acts under a chapter dealing with other torts), it is often pointed out that "logic is not the life of the law" (*cf.* Lord Morris of Borth-y-Gest in *West* v. *Shephard*) and here one would think it more practicable to deal with the two Acts in one and the same chapter since they are so related and so many cases involve claims under both Acts. As Professor Heuston points out: "The question whether a cause of action survives the death of the person injured must be carefully distinguished from the question whether the act of causing the death of a person gives any right of action for damages to his relatives." The reviewer feels that the distinction can be better maintained when the two are dealt with side by side so that they can be contrasted and compared at each stage.

Professor Heuston says in the preface to this new edition: "It is not a digest or an encyclopedia but a book which is intended to be read." Indeed *Salmond on Torts* is eminently readable, yet one cannot but wonder whether its readability would be increased were we not compelled continually to turn to the back of the book for the rest of the material on a particular topic (for example, Conversion is dealt with in Chapter 5—"Interests in Chattels"—but what damages are recoverable in an action of conversion are not dealt with until Chapter 28—"Measure of Damages in Particular Torts"). This dispersal of material has been increased for in the new edition the assessment of damages for libel and slander has been removed from the main chapter on defamation and placed in a much later chapter (Chapter 28).

It is relatively simple in a book of this size to find points with which one disagrees; it is not so simple to state in the space available the value of the book as a whole. Let it suffice to say that the fifteenth edition of *Salmond on Torts*, in the words of Sir John Salmond: "sets forth the principles of the law of torts with as much precision, coherence, and system as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility."

CHRISTINE DAVIES.

MISTAKE AND MISREPRESENTATION: A Study in Contractual Principles. By S. J. STOLJAR. [London: Sweet & Maxwell. 1968. 160 pp. inc. index. £2 10s. net.]

THIS is an unusual work. The title suggests a monograph but the substance is much more a long critical essay. Dr. Stoljar does not attempt to elaborate rules in a blackletter fashion but assumes that his reader is already familiar with most of the authorities and literature which he submits to a thought-provoking and often illuminating analysis. This is not a work in which the practitioner can quarry for cases or the beginner find a child's guide but it is one which teachers and their most able students should read from cover to cover.

Dr. Stoljar's approach can be regarded as both conservative and radical; conservative in that he thinks that the solutions to the problems he discusses can be found in the cases but radical in that he rejects the reasoning in many, if not most, of them. This approach has understandable attractions since the future is bleak for any writer in this field who attempts to accept all the reasoning in all the cases, but it is in danger of producing an account which is neither the law of England nor that of Utopia. Dr. Stoljar is not much interested in the law of Utopia and does not consider whether the sensible inhabitants of that country would be likely to burden themselves with a law of mistake. His general discussion of the nature of mistake is short and even somewhat perfunctory for his main concern is with English law though English law seen through his own special terms of reference.

At this stage we should state that the title is misleading in another way for the author thinks "that mistake has a pervasive significance for much else in contract law" and that it connects not only with misrepresentation but with the very meaning of contractual terms and so the scope of discussion ranges well outside the traditional contents of the chapters on mistake and misrepresentation in the contract textbooks. Stoljar is surely right to emphasise the central importance here of the nature of contractual undertakings but no subject illustrates better the vices of the English habit of muddling through. In earlier times it was well appreciated that there was a real difference between a man who sold a horse and warranted it sound and one who sold a horse and stated it to be sound, but a proper impatience with any need for magic words has led to this distinction being obscured and now perhaps even discarded.

As readers of this *Review* will already know, Stoljar divides mistakes into correspondence-mistakes (where the contract does not correspond to what the parties agreed should be their terms) and expectation-mistakes (where a party says that the contract includes facts and contingencies which he never knew about and in respect of which he would not have agreed to accept liability). He argues that only the former are true cases of the parties being excused because of mistake although there are exceptional cases of expectation-mistake where the parties may be excused for other reasons, *e.g.* in the case of sale of a non-existent thing the buyer may be excused by total failure of consideration while the seller is excused by impossibility of performance. The argument that the parties have different excuses enables Stoljar to deal neatly with the difficulties of a case such as *McRae* v. *The Commonwealth Disposals Commission* since a seller should not be excused for impossibility if he is culpable in not knowing of the impossibility. So too it is more likely to be culpable not to know that the goods have never existed than not to know that they have perished.

Stoljar's argument constantly casts new light on the leading cases though his criticisms will not convince all his readers. The present reviewer cannot follow the demonstration that *Solle* v. *Butcher* could have been decided to the same effect without recourse to equity (pp. 44–46) nor can he see the force of the criticism of the traditional analyses of *Raffles* v. *Wichelhaus* (pp. 16–19) and *Edgington* v. *Fitzmaurice* (pp. 122–123). Of the last case Stoljar says "to say that a representor represents an existing fact of intention is surely an awkward way of saying that he 'intends'; moreover, to regard this expression of intention as an existing fact seems a little peculiar, for it is a 'fact' which the representor may change: but existing facts are not changeable, only intentions are." This passage is not untypical of Stoljar's elusive style where every sentence calls out for further and better particulars but it seems to miss Bowen L.J.'s point, which is surely that, though intentions may not be translated into acts they can be misdescribed, for a subsequent change of intention cannot alter what is intended at the moment when intention is declared. It is true of course that problems of proof may rear their heads but often enough these can be resolved, at least in commercial cases.

This is not a book which should be allowed to fall into the hands of the credulous, but it will excite the critical reader sometimes to fury but often to new enlightenment.

M. P. FURMSTON.

ASPECTS OF COMPARATIVE COMMERCIAL LAW. Edited by JACOB S. ZIEGEL and WILLIAM F. FOSTER. [Montreal: McGill University and Oceana Publications Inc. 1969. xii and 472 pp. U.S. $17.50]

INSTALMENT CREDIT. Edited by PROFESSOR A. L. DIAMOND, LL.M. [London: Stevens. 1970. xxiii and 289 pp. £4 8s.]

THESE two books consist of papers read at conferences in 1968; the first book comprises the papers presented at a conference on comparative commercial law held at McGill University and the second the papers read at a conference held at Cambridge on the law governing instalment credit in connection with the acquisition of goods.

The first book is the wider ranging of the two, both because it deals with the sale of goods in its traditional form as well as the financing of acquisitions of goods and the forms of security for such financing, and because the number of legal systems which are compared in it are more numerous. It begins with a short account by Professor J. Honnold of Pennsylvania University of the problems which have arisen under article 2 (the sale of goods article) of the U.S. Uniform Commercial Code (which has now been adopted in all the states of the U.S.A.), and continues with a penetrating analysis by Professor G. Fridman (now of Alberta University and formerly of Sheffield) of the differences between English and American law in this field and of the points in the Uniform Code which could usefully be incorporated into English law. Canadian, German and Scandinavian contributions on related topics follow, among which is an interesting and informative account by Professor E. von Caemmerer of Freiburg University on recent developments in the German law governing liability for defects in manufactured goods to both the buyer and third parties. The second section of the book is concerned with the law governing consumer credit, and this is dealt with both from the micro-standpoint of the individual consumer, who may be treated oppressively if the ordinary rules of liability in debt are enforced against him without modification, and the macro-aspect of the state's interest in regulating the amount of consumer credit which is given. In this section the fairly brief accounts of English, American, Canadian and German law are vignettes which differ basically and in detail, and one cannot fail to observe how little the relevant law of other countries has been studied by governments before devising their own legislation. The last section of the book is taken up with the law governing securities created over goods, and the discussion is based on article 9 of the U.S. Uniform Commercial Code, that truly impressive reconciliation of the tangle of legal rules which in this country are spread over the Bills of Sale Acts, the Hire Purchase Acts, the Bankruptcy Act 1914, the Companies Act 1948 and the rules of common law and equity. The longest and most impressive contribution in this section is by R. M. Goode (aided by L. C. B. Gower) in which he gives a highly critical account of the existing English law, and makes constructive proposals for the adoption of article 9 by this country, subject to a number of modifications which experience and geography indicate to be desirable. The section also covers the other systems of law whose representatives attended the conference, and there is a particularly useful and concise account by Ulrich Drobnig of the Max Planck Institute, Hamburg, of the problems with which German law is at present struggling in trying to reconcile the financing of dealers by bank loans secured on stock-in-trade and trade debts with the universal practice of reserving the title to goods and their proceeds to the manufacturer or wholesaler until the dealer has paid for them.

The second book on instalment credit is mainly concerned with English law and practice in respect of hire-purchase and credit sales, but there is also a paper by Professor E. A. Farnsworth of Columbia University in which he outlines the corresponding European and transatlantic law. The book begins with a summary of the English law by Professor Diamond, and this is followed by a paper by R. G. Kirkpatrick and B. Greene (respectively a chartered accountant and a solicitor who have had extensive experience in the field of hire-purchase law) in which they examine a number of practical legal difficulties encountered by hire-purchase finance companies. Then comes the longest paper in the book, by R. M. Goode, on the legal regulation of lending for the purpose of acquiring goods. In this paper the writer covers the same ground as in his principal contribution to the McGill conference and shows the same enthusiasm for adopting article 9 of the U.S. Uniform Commercial Code, but he also goes in more detail into the ramifications of the Moneylenders Act 1900, which digs a number of pits for hire-purchase finance companies to fall into unwittingly. The book concludes with an informative paper on financing dealers' stock-in-trade by Professor Ziegel, in which he compares English, Canadian and American law, and an account of the economic restrictions imposed on hire-purchase and credit sale financing by post-war legislation in the U.K.

The contribution which these two books make to knowledge about legal techniques in the field of transactions in consumer goods is undoubtedly of great value. Inevitably conference papers on the laws of six or more countries cannot deal with the law of each in the depth and detail of a textbook, and the impression which the reader will gain of French, German and Scandinavian law will be only a general one. But where the law and practical problems are examined thoroughly, as they are in R. M. Goode's two papers on the creation of securities over goods, even the informed reader will find detail, comprehensiveness and novelty of information and views. These two books show once again that when the reform of one's own law is under consideration (as the law of consumer credit in the U.K. is at present by the Crowther Committee, of which R. M. Goode is a member) it is essential to discover how other systems of law have sought to deal with the same field of activity so that meritorious ideas can be adopted and difficulties which other countries' legislation have created may be avoided.

R. R. PENNINGTON.

SENTENCING IN A RATIONAL SOCIETY. By NIGEL WALKER. [Allen Lane The Penguin Press. 1969. xii and 289 pp. inc. index. £2·5.]

IN *Crime and Punishment in Britain* Dr. Walker described and assessed our penal system. In his new book he rejects many of the aims which this system is required to fulfil and examines the changes that would be necessary if its sole purpose and that of our criminal law were "reductivist," *i.e.* to reduce the incidence of activity which threatened the smooth functioning of society and the preservation of order. The examination is confined to the characteristics of such a reductivist system in our society "which is peaceful, affluent and ignorant, but aspires to rationality." It is important to stress that Dr. Walker is not bent on describing The Ideal Reductivist System—it would be most uncharacteristic of him to do so. His conclusions are severely practical and could be put into effect almost immediately. He discusses how it would be rational to organise the penal system, given society's state of development, its considerable technological resources, and its extensive ignorance about matters of penology. Provided some relevant information, no matter how little, is available, rational decision-making is possible.

As always, Dr. Walker writes lucidly, concisely, and with delightful irony. The non-specialist will find this book as intelligible, stimulating and valuable as the specialist; and both should read it. The primacy of reductivism is established in a most entertaining analysis of the suggested aims of a penal system. Only two limitations on the whole-hearted pursuit of reductivism are permitted, one of economy, the other of humanity. I find the argument here convincing, but I doubt if retributivists will be satisfied with the concession that, although retributive considerations should not govern sentencing, they could justify resort to the criminal process by an individual. However, *pace* Dr. Walker, we surely can talk of a reductivist system in terms of justice without thereby committing ourselves to uphold retributivism: although our main concern with a reductivist system would be its efficiency rather than its justice, inefficiency could be so great as to amount to injustice.

Dr. Walker's book is about much more than its title implies. In discussing the scope of the criminal law, he offers as its positive justification that it ensures the smooth functioning of society and the preservation of order, and in so doing claims to have rescued the fundamental part of Lord Devlin's thesis from his critics. Although the controversy about "The Enforcement of

Morals" shows how rash it is to restate what Lord Devlin was about, I suggest that one of the points he was concerned to demonstrate was that so secular a purpose provided neither a complete explanation nor justification of the criminal law. The rational approach to deciding when and how to apply the criminal law is illustrated by an explanation of how the neutral majority should decide what to do about an activity called Xing indulged in and bitterly opposed by two minorities. "They would ask themselves whether prosecuting people for Xing or prosecuting those who attacked Xers would prevent disturbances at the less cost; and in this context costs would be reckoned in terms of people penalised as well as man-hours of work by law-enforcement agencies." I am not sure that the application of this formula would give the wisest solution to the problem posed by the coming South African cricket tour.

Dr. Walker ranges beyond criminal law and the penal system in examining techniques of crime reduction. In an excellent discussion of deterrence he shows, on the basis of work done by the Government Social Survey, that most people overestimate their chances of detection in crime. But it does not necessarily follow from this, as Dr. Walker argues, that only an enormous increase in the probability of detection would increase the deterrent effect of the law.

The main body of the book is devoted to a discussion of the sentencing structure in a reductivist system. Dr. Walker advocates a sentencing tribunal, but the tasks he would give it are far fewer than many advocates of such tribunals would wish. He is surely right in arguing that the few factors that are known to be related to penal success can be taken into account in a great many instances as well by a court as by a tribunal. One of the tasks of the tribunal would be the imposition of imprisonment which is "precautionary" rather than "corrective." Dr. Walker thinks that our failure completely to abandon attempts to reform offenders given extended sentences is irrational: the high reconviction rates of such offenders should be taken as an indication, not of the remarkable ability of the penal system to achieve something with such unpromising material, but of the accuracy of the courts' selection in the first place. If this is so, why is the task of imposing precautionary imprisonment to be taken from the courts? The answer is not that the reconviction rates are not high enough, but that the courts' control over the length and type of custodial sanctions would be limited generally. On the first occasion they commit a man to prison, he would be detained for between six months and two years, on the second occasion for between the length of his first sentence plus six months and five years. After that the courts would commit to the sentencing tribunal, and one of the sanctions available to the tribunal would be precautionary imprisonment. To mark the distinction between this and corrective imprisonment, the former would be indeterminate but not shorter than five years.

Another respect in which the reductivist system would differ from our present one is that courts would be encouraged to look upon sentencing as a much simpler task than they feel it to be at present, by making them forgo the "diagnostic" approach to sentencing which assumes that there is only one correct sentence for every offender, in favour of the "strategic" approach. This would use information about the relative effectiveness of different penal sanctions to maximise the number of successful decisions for any group of offenders coming before the courts, and would require far less information about most offenders than the diagnostic approach. It would also make more efficient use of those who provide information to the courts. The formula at present suggested by this approach, which has been developed by the author elsewhere but is supported here by fresh mathematical calculations, is to fine first offenders, put second offenders on probation, and to resort to custodial sanctions for third offenders. Clearly, adopting the strategic approach will involve a change in the courts' approach to sentencing. Clearly, too, it is capable of providing formulae whose application would result in substantial changes in the patterns of sentencing decisions. But since the particular formula offered is intended to admit of exceptions, I am not sure that its application would result in as great a change as Dr. Walker suggests. Nevertheless it might ease the unnecessarily laden conscience of the courts, an important benefit in itself.

Of equal importance and interest as the development of his main theme are Dr. Walker's discussions of particular elements in a sentencing structure. To list a few—maximum, minimum and mandatory penalties, reasoned decisions, the assumptions of our sentencing system, and the prosecution's role in sentencing. He is excellent, too, at exposing our uneasy rationalisations of features of our system in conflict with the principles which are supposed to guide it. Examples concern the measures taken to prevent harm rather than to react to it, strict liability offences and the difficulties we get into when we try to distinguish treatment from punishment. Dr. Walker would make short work of Professor Packer's analysis of the latter theme in "The Limits of the Criminal Sanction."

Even if advances in knowledge show that it would be rational no longer to advocate Dr. Walker's particular proposals, this book will remain invaluable for its general approach to the planning and for its discussion of the elements of a penal system. The style of its approach, if not its volume, put it alongside the work of Bentham and the theorists of Social Defence.

STEPHEN WHITE.

AFRICAN PENAL SYSTEMS. Edited by ALAN MILNER. [London: Routledge & Kegan Paul. 1969. xiii and 501 pp. 70s.]

CRIMINAL LAW OF EAST AND CENTRAL AFRICA. Law in Africa No. 23. By J. J. R. COLLINGWOOD. [London: Sweet and Maxwell, African Universities Press. 1967. xlix and 318 pp. 70s. bound, 37s. 6d. paper.]

DR. Milner has gathered together an impressive range of contributions on penal policy and practice throughout Africa. Half the book is filled with what look like, and are, extended replies to a circular asking for information on "the system of criminal law," on "judicial organisation," on "the purpose of the penal system," on "the treatment of adult and juvenile offenders" and so on. There is consequently a certain sameness in some of the contributions: "yes there is a European code superimposed on a rather ill-defined indigenous system"; "yes there is a shift from crimes of personal violence to crimes of property as the population moves to the towns"; "yes we have got prisons"; "yes there is statutory provision for probation, but we haven't quite got round to implementing it yet." The quality of these vignettes varies considerably, from a grotesque reply from a gentleman in Lisbon who writes as if he had never been anywhere near Portuguese Africa, to some quite thoughtful pieces from some of the ex-English territories.

The second part contains a series of more specialised contributions in which the authors have obviously been given more or less of a free hand. This generally makes for more interesting reading: a splendid black comical account by Robert Seidman of the vicissitudes experienced in attempting to impose each new development of the British penal system on native prisons in the Gold Coast, a veiled political attack by David Welsh on the increasing use of capital punishment in South Africa, and a very revealing analysis by Jacqueline Costa of the impact of nationalism and an economic inferiority complex on penal legislation in French Africa have stuck in my mind.

The message in all this which is picked out in Dr. Milner's brief introduction, is of the problems in dealing with crime and delinquency in a period of rapid urbanisation under what are essentially alien systems of criminal law and penology. The breakdown of kinship and customary constraints on the move to the towns leaves a Durkheimian vacuum in accepted morality which the property-based conception of criminality prevailing in Europe is less than adequate to fill. European ideas of crime and punishment, and of retributive imprisonment, do not always seem fully appropriate to the African. Not that there is any such thing as an African ideal: Dr. Milner's own empirical analysis of sentencing patterns in different parts of Nigeria shows clearly how differing racial and religious backgrounds may affect the approach adopted in the courts.

These are fascinating issues both for the African lawyer and for all criminologists and sociologists. Yet the book is strangely unsatisfactory in its treatment of the questions which it raises, at least in my mind. The relationship between the European and the African in law and in practice is not really worked out. There is a current of criticism of the wholesale application of expatriate law and procedure, and a constant yearning for more and better Africanisation. But there is not much constructive argument. The accepted standard in matters of penology is taken to be something called "the modern penal system," whatever that may be. Criminological thoughts in Europe and America are apparently now wholly applicable in Africa despite the debacles of the past fifty years or so. The contributors are in a sense just as steeped in the current Anglo-American tradition as their administrative predecessors, and likewise regard that system as the ultimate goal. I cannot help wondering whether future commentators will not find their faith equally touching and naive. There is no evidence that I know of, here or anywhere else, that our latest social casework orientation is the ultimate answer, or that it is specially appropriate in an African context.

There is also a disappointing failure to integrate recent anthropological material on traditional African conceptions of law and justice. If there is any point at all in a programme for Africanisation, it is studies of this kind which must serve as a guide to what are the natural procedures and penalties for the various types of offence, from personal violence to property crimes. The anthropologists have at least made it clear that justice is just as much a culturally-based conception as any other. And there is some evidence of a tendency among Africans to regard justice as a matter of conciliation and compensation rather than of crime and punishment. It may well be that the whole system of adjudication which we have imposed is out of tune with African sensibilities, whether in the traditional tribal situation or in the context of independence and development. There is perhaps more in the current battle between the government and the expatriate judiciary in Zambia than simple power politics.

The failure to press these issues is, I think, the fault of the editor rather than of the contributors. The form of the solicited contributions and the very limited scope of Dr. Milner's introduction make it difficult for the reader to focus his attention on what seem to me to be the important issues of policy and practice. The material is often there, but there is no connecting thread, no conscious attempt to formulate a better mix of the European and the African. Perhaps this is too much to ask. This is after all the first book of its kind which attempts such a wide coverage. But there is certainly a lot of thinking to be done.

There is a certain irony in dealing with a straight legal account of the criminal law of East and Central Africa in this context. Mr. Collingwood's book has very little to do with the special problems of Africa, except perhaps in the interesting account of the new laws on treason and sedition, and of the attempt to fit witchcraft into the common law. Its attraction is the paradoxical one of showing us here in Britain the kind of text and analysis which a criminal code may lead to. I am not competent to judge the book on points of detail; it will be obvious by now that I have not Been To Africa. But its form and arrangement—the various sections set out followed by some further explanation and then some cases by way of exemplification—does make a pleasant contrast to the contemporary English academic style. The apparent simplicity of the law as Mr. Collingwood explains it is perhaps deceptive. Many parts of the codes are still essentially grounded in common law. But if we can get a clear and simple formulation from the Law Commission of the main offences and of the "general part," the whole business of teaching the law will be immeasurably simplified and shortened. And there will be all the more time for other equally important aspects of the study of the criminal law, like those touched on in Dr. Milner's book.

TOM HADDEN.

CANADIAN FEDERALISM: MYTH OR REALITY. Edited by J. PETER MEEKISON. [London: Methuen & Co. Ltd. 1969. xv and 482 pp. £2 10s.]

PUBLIC ADMINISTRATION IN CANADA: SELECTED READINGS. Edited by A. M. WILLMS and W. D. K. KERNAGHAN. [London: Methuen & Co. Ltd. xi and 478 pp. £2 10s. net.]

THESE useful collections of essays (including a number of government papers) are intended to introduce students to the issues which currently confront Canadian federalism, and to problems of public administration, respectively. The first is probably of more direct interest to the law teacher. It is divided into six parts: the nature of federalism, a panoramic view of Canadian federalism, constitutional interpretation in Canada, judicial-provincial financial relations; co-operative federalism (which again deals extensively with fiscal problems) and Quebec and Canadian federalism. With the exception perhaps of the section dealing with constitutional interpretation, the essays presented are of very considerable interest. Those dealing with federal-provincial financial relations which discuss the aims of fiscal policies in federal systems and the evolution of institutional machinery to deal with the inevitable problems which result are, in particular, indispensable to an understanding of Canadian federalism. Similarly, the section on Quebec and Canadian federalism does much to explain the tensions which have resulted both from the clash of expansionist economic policies at federal and provincial levels and what have appeared to be Federal intrusions into areas of cultural and educational significance constitutionally allocated to the provinces and long considered to be vital to Quebec. At times, as Mr. J. L. Pepin notes, Quebec views are cast in barren terms of legal proprieties founded upon abstract notions of federalism (a point underlined by the constitutional conference of December 1969 in which Mr. Bertrand, the Prime Minister of Quebec, seemed to wish to deny to the Federal government, on legalistic grounds ostensibly, the right to make payments of old-age pensions to individuals). The debate at times becomes bitter, as in M. Leger's short essay denouncing "co-operative federalism" as a cloak for judicial intervention; at times pyrotechnic as when Dr. Forsey, following a nautical dictum, places his ship alongside those of the enemy (in this case those who advocate independence or "associate state" status for Quebec). There is no shortage of government views on these issues. This volume contains papers by a former Prime Minister, Mr. Pearson, the present Prime Minister, Mr. Trudeau, a former Prime Minister of Quebec, Mr. Lesage, other Ministers both federal and provincial, and several civil servants.

My principal reservations concern the essays on constitutional interpretation. The general doctrines of interpretation are dealt with by Miss M. Fletcher in an essay which is both pedestrian and dated. Professor Morin, in a piece dealing largely with reform of the Supreme Court, does deal with interpretation, but in a manner which appears to be decidedly *parti pris*. Both in the use of statistics and in the selection of cases for mention (but hardly analysis) there appears to be a certain bias at work. Some cases which uphold Federal pretensions are mentioned: those which favoured the provinces are ignored. The reader is expected to accept almost *a priori* that when judges are selected by the Federal government, their decisions tend always to favour the central power. One could hardly say that the truth of the proposition had been demonstrated.

The final section of the volume on Public Administration also contains material of interest. Mr. Driedger Q.C., a former Deputy Minister of Justice and a noted draftsman, has written an essay which is of interest on the types of authority to make subordinate legislation conferred under statute. A diagnosis by Professor Lawford of some problems of judicial review appears, but most interest is likely to centre around essays by Mr. S. D. S. Hughes and Professor Rowat on the need for greater openness in government, and for review by ombudsmen of arbitrary exercises of governmental power. Of interest also are essays by Mr. Cole on the federal bureaucracy and federal-provincial relationships and by Professor Willms on governmental agencies.

There is, finally, one curious feature of Professor Meekison's book to be noted. Prime Minister Trudeau's contribution appears in both French and English. Those of M. Leger and Professor Morin (the latter a lengthy contribution) appear in French only. If it was thought impracticable to provide dual texts of both, could not an abstract of the latter at least have been provided? All Canadian university students may now be able to translate French fluently. Doubtless they ought to be able to do so. In my day, at Professor Meekison's university, it was otherwise.

L. H. LEIGH.

THE BRITISH TRADITION IN CANADIAN LAW. By THE HON. MR. JUSTICE BORA LASKIN. Hamlyn Lecture 21st Series. [London: Stevens & Sons Ltd. 1969. xv and 188 pp. £1 15s.]

THE choice of Mr. Justice Laskin, formerly a distinguished academic and now a distinguished judge of the Ontario Court of Appeal, to give this series of lectures was a very happy one. As those acquainted with his writings would expect, the result is a happy blend of scholarship and forthright exposition. The lectures deal respectively with the reception of English law and the legal institutions, English law in Canadian courts, the education and organisation of the profession, and the British tradition in Canadian federalism.

The reader will discover that, in some minor respects, parts of the English heritage have been rejected. Wigs are not worn. Some provinces do allow contingent fees, subject to regulation. Some practices have not transplanted well. That of conferring the distinction of Queen's Counsel is an example; we have so many of them, and some of the recipients would view a day in court with about as much enthusiasm as an early Christian contemplating unarmed combat in a den of lions. In more fundamental matters a considerable similarity (and often identity) is apparent. Even in Quebec, and not only in the area of public law, the English influence is evident. No longer need the Council of Legal Education inquire whether equity forms part of the *corpus* of Canadian law. Even in Quebec, the fiducie (a concept adapted from the trust) flourishes. The unitary character of the judicial system also reflects an English (and Imperial) model.

It is plain that Mr. Justice Laskin, while welcoming the willingness of Canadian courts to rely on American and Commonwealth precedents, views the continuing dependence of Canadian courts on English precedents with some impatience. As one would expect of him, there is a plea for greater self-reliance and creativity on the part of Canadian courts. In part this will depend on the influence of legal education and here a considerable change has taken place. The university law faculties now undertake exclusively academic education in law. Their libraries, though modest by American standards, far outstrip those generally available in England, and their faculties have both the inclination and the opportunity to be receptive to the influence of the United

States and other jurisdictions. But even so, it will be long before the British tradition in Canadian law ceases to be a living thing, and independence, while it should not be accompanied by continued subservience to an English model, need not and as Mr. Justice Laskin shows, undoubtedly will not, imply a petulant severance from our legal roots.

L. H. LEIGH.

LAW MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION. By THOMAS BUERGENTHAL. [New York: Syracuse University Press. 1969. 274 pp. inc. index and bibliography. $10.50.]

IN this book, the seventh in the Procedural Aspects of International Law Series, the author examines the law and practice of the International Civil Aviation Organisation—a Specialised Agency of the UN—in relation to membership, legislation, the settlement of disputes, and amendments.

In the General Introduction, Professor Buergenthal justifies his concentration upon a single organisation—if justification be needed—with the claim that comparative studies of the law of international organisations "fail more often than not to take account of the institutional transformations that the constitutive instruments or the organizations themselves have undergone. This in turn leads to factually untenable conclusions about the legal significance that attaches to the actions of these organisations" (pp. 1–2). This pitfall the author has avoided, for he possesses a very thorough knowledge of the practice of ICAO and of the political, technical, economic and legal background to the decisions that have been taken.

Exclusive attention to one agency does have its disadvantages, however. Though each of the Specialised Agencies has a life of its own, there are many similarities (*e.g.* of composition and structure) and many common problems. Not to look beyond ICAO in examining these problems, and the solutions which have been proposed or adopted, may be to forfeit valuable insights (*e.g.* in the discussion on reservations to the Chicago Convention (pp. 24–29)). Moreover, organisations do not adopt their own characteristic approach to all questions; on diplomatically sensitive subjects—and this includes many aspects of membership—governments normally insist upon all their representatives taking a uniform position. To ignore this fact, as well as the leading role frequently played in such cases by the UN, is misleading.

The single-organisation approach is most appropriately employed in the section on ICAO's "technical legislation" (concerning such matters as the Rules of the Air); the law and experience of the Organisation in this field is indeed *sui generis*. Professor Buergenthal reveals highly developed powers of analysis in interpreting such badly drafted instruments as the Chicago Convention; he also displays sound common sense in his sympathetic attitude towards the Organisation's attempts to reconcile frequently ambiguous rules, laid down over a quarter of a century ago, with the constantly changing needs of modern aviation. He approves of the Organization's refusal to insist upon compliance with its regulations by states which are unwilling or unable to conform, on the ground that implementation of at least some regulations by all states, and of most by a few, is better than jeopardising a universality which is essential to the safe and efficient operation of the whole system of international civil aviation.

It is unfortunate that, while referring to ICAO's regulations as "legislation," the author makes no attempt to explain his use of the term. Technical Annexes or amendments thereto which are passed by the Council do not become effective if a majority of Contracting States register their disapproval. Moreover, apart from a few exceptions, even regulations which do enter into force do not bind members which find it "impracticable" to implement or comply with them; and even the obligation to report divergences from the regulations is not enforced. This is far removed from "legislation" in the municipal law sense; not to point out this difference nor to justify the use of the expression here is a serious defect.

This observation leads to a further criticism. Grouped with "technical legislation" under the title "Law-Making in the ICAO" are, as we have seen, the topics of membership, amendments to the Convention and the settlement of disputes; but no attempt is made to explain their inclusion under that head. Amendments to the Convention only bind states which ratify them (though others may in practice refrain from challenging those amendments which relate solely to the internal organisation of the agency); if this is law-making, it is at best a kind of "law-making by consent." A decision in a dispute as to the interpretation of the Convention, on the other hand, is perhaps a kind of "(quasi-) judicial legislation," inasmuch as it binds the parties to that dispute and may constitute a precedent for the future. As for decisions on membership, these could conceivably be characterised as "law-making" in two senses: they constitute semi-authoritative interpretations of the relevant constitutional provisions, and members are obliged to recognise their validity so far as the internal law of the Organisation is concerned. But these are all very different and very special types of "law-making," and to lump such disparate processes together under the same rubric without any attempt to analyse their nature or to relate them to each other is quite unsatisfactory. Accordingly, while welcoming his informative exposition of specific topics, one can only regret that Professor Buergenthal has not fulfilled the promise implicit in the book's title by tackling the larger problem.

MAURICE MENDELSON.

Book Notices

SCANDINAVIAN STUDIES IN LAW 1969. Edited by FOLKE SCHMIDT. Vol. 13. [Stockholm: Almquist and Wiksell. Published under the auspices of the Faculty of Law, Stockholm University. 248 pp.]

The articles in this annual collection include "Reliance on Authorities or open Debate? Two Models of Legal Argumentation"; "Public Regulation of Private Real Property"; "Grotius's Doctrine of Contract"; "The System of Legal Systems. Notes on a Problem of Classification in Comparative Law"; and "Civil Law, Common Law and the Scandinavians."

MODERN TRADE UNION LAW. By CYRIL GRUNFELD. [London: Sweet & Maxwell. 1970. £1 15s. 0d.]

This is a reprint in paperback of the original 1966 hardback edition reviewed in (1967) 30 M.L.R. 465.

COPYRIGHT LAW SYMPOSIUM No. 17. Nathan Burkan Memorial Competition Sponsored by the American Society of Composers, Authors and Publishers. [New York and London: Columbia University Press. 1969. 199 pp. inc. index. 54s.]

The five prize essays in this annual American student competition are: "A copyright Labyrinth: Information Storage and Retrieval Systems"; "The Educator and the Copyright Law"; "Royalties without Copyright: Proposals for a Payments Agreement between the U.S. and the Soviet Union"; "Community Antenna Television and Copyright Legislation"; and "Reflections on the Problem of Parody-Infringement."

MODEL CYBERNETYCZNY POWSTAWANIA I DZIALANIA PRAWA. By ANDRZEJ KISZA. [Warsaw: 1970. 204 pp. inc. index.]

This book, in Polish, contains a twenty-eight-page summary in English of the theme of the book: a "cybernetic legal model" dealing with the treatment of legal phenomena as a self regulating causal mechanism.

DRINK, DRUGS AND DRIVING. By H. J. WALLS and A. R. BROWNLIE. [London: Sweet & Maxwell. Edinburgh: W. Green and Son. 1970. 190 pp. inc. index. £1 5s. 0d.]

This is a complete guide to the subject. The book deals with the law of impairment through drink or drugs, the legislation setting up a prescribed level offence, the practical aspects of breath tests, and the provision of blood and urine specimens and their analysis, and also the mass of case law which has occurred.

CRIMINAL LAW AND PROCEDURE. By I. G. CARVELL and E. SWINFEN GREEN. [London: Sweet & Maxwell. 1970. Concise College Texts. 410 pp. inc. index. Hardback £2 15s. 0d. net. Paperback £1 5s. 0d. net.]

This is a new clear and comprehensive outline of both criminal law and procedure written primarily for students preparing for the Bar, Law Society and other professional examinations as well as providing a modest aid for more academic studies.

BEST LEGAL STORIES 2. Edited by JOHN WELCOME. [London: Faber and Faber. 1970. 220 pp. 30s.]

Fourteen entertaining legal stories selected from a distinguished list including Somerset Maugham, Cyril Hare, Honoré de Balzac, Henry Cecil, Michael Gilbert, Louis Auchincloss, O. Henry, Julian Prescott, etc. An excellent diversion for any lawyer.

Books and Publications Received

ESTATE DUTY IN ENGLAND AND WALES. By A. DOUGLAS LAWTON. [London: Sweet & Maxwell. Concise College Texts. 1970. 169 pp. inc. index. Hardback £1 12s. 0d. Paperback 16s.]

ESTATE DUTY ON SETTLED PROPERTY. By JOHN MOWBRAY. [London: Sweet & Maxwell. 1970. 119 pp. inc. index. £1 5s. net.]

ELEMENTS OF THE LAW OF INCOME AND CAPITAL GAINS TAXATION. Ninth Edition. By C. N. BEATTIE. [London: Stevens and Sons. 1970. 826 pp. inc. index. £8 8s.]

POTTER AND MONROE'S TAX PLANNING WITH PRECEDENTS. Sixth Edition. By D. A. SHIRLEY and STEPHEN J. L. OLIVER. [London: Sweet & Maxwell. 1970. 485 pp. inc. index. £5.]

THE TAX SYSTEM IN SWEDEN. By MARTIN NORR, CLAES SANDELS and NILS G. HORNHAMMAR. [Stockholm, Sweden: Stockholms Enskilda Bank. 1970. 188 pp. Copies may be obtained without charge by request to Stockholms Enskilda Bank, 106 22 Stockholm 16, Sweden.]

TAX AND THE FAMILY BUSINESS. Fourth Edition. By MILTON GRUNDY. [London: Sweet & Maxwell. 1970. 178 pp. inc. index. £1 12s.]

RIGHTS OF WAY AND ACCESS TO THE COUNTRYSIDE. Second Edition. By J. F. GARNER. [London: Oyez Publications. 1970. 127 pp. inc. index. 30s.]

Charlesworth on Negligence. Seventh Cumulative Supplement to the Fourth Edition. By R. A. Percy. [London: Sweet & Maxwell. 1970. £1 1s.]

The Patents Acts 1949–1961. With a Commentary by the Chartered Institute of Patents Agents. Third Cumulative Supplement. [London: Sweet & Maxwell. 1970. 10s. net.]

Marriage and Divorce under Yoruba Customary Law. By R. O. Ekundare. [University of Ife Press. 1969. 90 pp. inc. index.]

The Nigerian Law Journal, Vol. 3. 1969. [London: Sweet & Maxwell. 1970. 186 pp. Hardbound £4 10s. Paperback £2 18s.]

The Law of Preventive Detention in India. By S. K. Ghosh. [Bombay: N. M. Tripathi Ltd. London: Sweet & Maxwell. 1969. 207 pp. inc. index. £2.]

The Time of Our Lives. The Ethics of Common Sense. By Mortimer J. Adler. [New York: Holt, Rinehart and Winston Inc. 1970. 361 pp. $7.95.]

No Peace—No War in the Middle East. By Julius Stone. [Sydney: Maitland Publications Pty. Ltd. for the International Law Association. 1970. $1.] A lecture delivered in November 1968.

The Law Practice of Alexander Hamilton. Documents and Commentary. Vol. II. Edited by Julius Goebel Jr. [New York and London: Columbia University Press. 1970. 967 pp. inc. index. 270s.]

Labor and the Legal Process. By Harry H. Wellington. [New Haven and London: Yale University Press. 1970. 409 pp. inc. index. £1 12s.] This is a paperback reissue of the 1968 volume, reviewed in (1969) 32 M.L.R. 586.

Cockle's Cases and Statutes on Evidence. Eleventh Edition by G. D. Nokes. [London: Sweet & Maxwell. 1970. 590 pp. inc. index. £3 18s. net.]

Marriage Counselling in the Community. By W. L. Herbert and F. V. Jarvis. [London: Pergamon Press. Commonwealth and International Library. 1970. 79 pp. inc. index. 20s. hard cover, 15s. flexi-cover.]

The Howard Journal of Penology and Crime Prevention. Vol. XIII, No. 1. 1970. [London: Butterworths. 92 pp. £1.]

Restatement of African Law. Vol. 3. Malawi: The Law of Marriage and Divorce. By J. O. Ibik. [London: Sweet & Maxwell. 1970. 214 pp. inc. index. £3 18s. net.]

Guide to the Legal Profession in East Africa. By Tudor Jackson. Law In Africa No. 28. [London: Sweet & Maxwell. 1970. 88 pp. inc. index. £1 5s. net.]

Bantu Law in South Africa. Third Edition. By S. M. Seymour [Cape Town: Juta and Co. Ltd. London: Sweet & Maxwell. 1970. 429 pp. inc. index. £10 10s. fully bound, £7 10s. 6d. paperbacked.]

The Bombay Rents Hotel and Lodging House Rates (Control) Act 1947. A Commentary. Fourth Edition. By J. H. Dalal. [Bombay: N. M. Tripathi Pte. Ltd. London: Sweet & Maxwell. 1969. 895 pp. inc. index. £3.]

CORRESPONDENCE

THE EDITOR,
The Modern Law Review

Dear Sir,

Were there no other cause, Professor Wedderburn should at least be admired for his resilience. Having followed, with misgivings, his views as expressed in your journal recently on *Hogg* v. *Cramphorn* [1966] 3 All E.R. 420 and *Bamford* v. *Bamford* [1969] 1 All E.R. 969, I fully expected the decision of the Court of Appeal in the latter case to give him his quietus; but he turns even this bare bodkin aside with panache.

The Professor chides Harman L.J. for having been unaware of certain "high authority": (1969) 32 M.L.R. 563. I, too, was thus unaware; so I looked, as directed by note 5 on that page, at *Modern Company Law* (2nd ed.), p. 512, note 37. This reads (with my italics):

> "*This seems to follow* from *Punt* v. *Symons* . . . *Galloway* v. *Halls Concerts* . . . and *Piercy* v. *Mills* . . . in all of which the *minority* were allowed to institute proceedings, *thus implying* that ratification in general meeting would be ineffective: . . . see *infra*. . . . Hence *it is submitted* that in the *Savoy Hotel* case . . . ratification in general meeting would not have validated the transaction."

This note looked more wistful than authoritative to me, but expecting both Professor Gower and Professor Wedderburn to have checked their authorities, I chased the information given in the note. Only one case (*Galloway*) shows a minority suing, and none supports the propositions made for them. Thus Professor Wedderburn's "high authority," with which he flays the Court of Appeal, turns out to be mere whimsy.

The undue awe in which Professor Wedderburn appears to hold the views expressed in *Modern Company Law* is perhaps gently illumined by his reference, at (1967) 30 M.L.R. 81, line 17, to Professor Gower having "held" that where directors have acted out of an improper purpose, the minority can sue and there can be no ratification.

There is much else in these notes and articles by Professor Wedderburn to suggest that the conceptual muddle—(1969) 32 M.L.R. 563—has overcome not the courts but the professor himself. How, for instance, can anyone (not himself in a muddle) bring into a discussion of the *Foss* v. *Harbottle* principle, the case of *Re Roith Ltd.* [1967] 1 All E.R. 427—see (1969) 32 M.L.R. 563, note 8. *Foss* v. *Harbottle* concerns the right of *members* to control directors acting *intra vires*. *Re Roith* is a case of *creditors* attacking an *ultra vires* act: the members were not remotely involved.

As a teacher of students whose papers are likely to be marked by or under the supervision of Professor Wedderburn and his disciples, I must express grave misgivings as to his views on this matter. May I express the earnest hope, if any *external* student of London University prefers, with the Court of Appeal, to regard it as trite law that directors can obtain absolution from their members, that the professor's undoubted enthusiasm for his conceptual muddle will not send that student round again for another go.

Yours faithfully,

H. J. L. PHILLIPS.

11 New Square,
Lincoln's Inn, W.C.2.

Professor Wedderburn writes :

Mr. Phillips' letter requires a careful answer, not least because of its many misconceptions.

1. He complains that of the three cases cited in Gower, *Modern Company Law* (2nd ed.), p. 512, note 87, only one involves a "minority" shareholder plaintiff. But in both the cases he rejects, *Punt* v. *Symons* and *Piercy* v. *Mills & Co.*, the plaintiffs' contextual status was a majority status (for the purpose of the dispute) if they won, but a losing minority if they lost their suit. In *Piercy* the categorisation is perhaps, therefore, a matter of taste. But in *Punt*, the plaintiffs were, in strict terms, a minority *unless and until* a court set aside the issue of the new shares (see Byrne J. [1903] 2 Ch. at p. 516).

2. More important, since a case is authority for its *ratio* not its facts, these decisions have been traditionally cited (with many others such as *Alexander* v. *Automatic Telephone Co.* [1900] 2 Ch. 56) for the proposition that directors who break fiduciary duties in wrongfully exercising their powers may be liable in a derivative action brought by an individual, commonly minority, shareholder. (See for older authorities, Stiebel, *Company Law* (3rd ed., 1929), p. 286; Palmer, *Company Law* (19th ed., Topham), p. 172; and now *ibid.* (21st ed., Schmitthoff and Thompson) p. 529; Buckley, *Companies Acts* (13th ed.), p. 865).

3. Another ancient principle underlay such cases, namely: when the shareholders cannot sanction, there may be a right of action; but "in respect to any transaction which they could sanction, although the directors might not have been justified in what they were doing, there could be no right of action," *per* Lord Cranworth, *Davidson* v. *Tulloch* (1860) 3 McQ. 783, 796 (H.L.Sc.). The footnote in Gower summed up all these points, while rightly suggesting that no decision had overtly tied all the ends together. Recent decisions have increased the uncertainty and muddle—see Gower, *Modern Company Law* (3rd ed.), p. 586; or if that is unacceptable, H. Lesser [1969] Camb.L.J. 198.

4. I objected to Harman L.J. saying it is "trite law" that directors can "obtain absolution and forgiveness for their sins" by shareholders' sanction, whatever the sin may be—lack of quorum, defects in appointment, "no proper appointment," improper or collateral motives, or even mala fides and "bad faith": [1969] 1 All E.R. 972. The last he confused with collateral purpose, which Plowman J. was careful not to do. I cannot share Mr. Phillips' "earnest hope" that students will "regard it as trite law that directors can obtain absolution from their members." Such a statement is not adequately scrupulous. Some sins cannot be forgiven by shareholders. In *Davidson* v. *Tulloch* the directors' breach could not be so sanctioned "even against a single dissentient," *ibid.* at p. 797. A century of distinctions between wrongs that can and cannot be sanctioned is not swept away by one judgment which cites few cases and misstates the facts of one upon which it relies.

5. I was at fault in not stressing that Harman L.J. at p. 973, as well as Russell L.J. at p. 976, suggests that *Bamford* was a derivative, *not* a personal, action, as had been said below. As a teacher of company law, Mr. Phillips will appreciate how important that was, though he kindly omits it from his criticisms.

6. By failing to make any precise citation, Mr. Phillips implies that I threw in *Re Roith* [1967] 1 All E.R. 427, ignorant as to its facts. My note in (1967) 30 M.L.R. 566 would reveal his mistake; and footnote 8 of the note about which he writes takes him there via (1968) 31 M.L.R. 689. He claims *Re Roith* involves an *ultra vires* act. The judgment did not say so, only the headnote to the *All England Report*. I took the view that this difficult judgment rested on the failure by directors to act bona fide. Opinions differ still

as to its proper interpretation; but one cannot believe that the case is irrelevant to a discussion of the rule in *Foss* v. *Harbottle* unless, like Mr. Phillips' letter, one takes a mistakenly simplistic view of that rule. (See, if neither Gower nor Wedderburn is acceptable, S. Beck's interesting essay in *Studies in Canadian Company Law* (ed. J. Ziegel), pp. 545–602.) In this context Mr. Phillips' amusing remark that any examiner might give marks only to students who agree with his opinions on such disputed questions might dangerously mislead the students whom he teaches. Whatever the final opinion, one always welcomes informed, logical and imaginative answers.

7. Perhaps Mr. Phillips will accept the view of Dr. Prentice, whose opinions tend to differ from mine, that the *Bamford* decision "does little to clarify this contorted area of the law" (1969) 47 Can.B.R. 652. I know of no teacher in the field, in Britain or the Commonwealth, who does not at least agree that the law displays some degree of "conceptual muddle"—except, now, Mr. Phillips.

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THE LAW RELATING TO ORGAN TRANSPLANTATION IN ENGLAND

A. INTRODUCTION

The first heart transplant at the end of 1967 fired the imagination of the world. It also proved to be the signal for medical teams in many countries to perform heart transplants, lung transplants, liver transplants and also to step up the rate of kidney transplants. The term "spare-part surgery" became part of popular language. Today doubts are still being expressed as to whether or not there has been a false start. The countries in which these pioneer operations are occurring have been caught unawares and the medical, legal, ethical and social issues are still being debated.

> "This is a new area of medical endeavour; its consequences are still so speculative that nobody can claim an olympian detachment from them. Those who work outside the field do not yet know enough about it to form rational and objective conclusions. Paradoxically, those who work in the thick of it . . . know too much and are too committed to their own projects to offer impartial counsel to the public, who are the ultimate judges of the value of spare-part surgery."[1]

It is the purpose of this article to examine the law relating to this area of medicine.[2] As one would expect, there are several aspects which are uncertain and obscure; it is necessary to attempt to state the present law, to examine the various legal problems which exist and to discuss the different solutions which are possible. The legal analysis cannot be divorced entirely from considerations of medical practice and medical and social ethics, but an attempt will be made so far as is possible to side-step controversial extra-legal issues.

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[1] D. Longmore, *Spare-Part Surgery*, Aldus, 1968, p. 169.

[2] The legal literature is growing. For excellent discussions see, *inter alios*, Castel, "Some Legal Aspects of Human Organ Transplantation in Canada" (1968) 46 Can. Bar R. 345; Kennedy, "Alive or Dead? The Lawyer's View" [1969] C.L.P. 102; Edmund Davies L.J., "A Legal Look at Transplants" (1969) 62 Proc.Roy.Soc.Med. 633; Louisell, "Procurement of Organs for Transplantation" (1969) 64 Northwestern Univ.L.R. 607.

Homografts (*i.e.* transferring "parts" from one human to another) are not new. In 1890 the first successful bone transplantation was recorded; blood transfusions are commonplace; and corneal homografts are also standard operations. The first kidney transplant was perhaps the most interesting step forward in the direction of Huxley's Brave New World and it raised the wider non-medical issues which still have to be decided. Transplantation is now possible from either living or dead donors and the problems arising from each method must be considered separately.

B. TRANSPLANTATION FROM LIVE DONORS

1. *The background*

Seven thousand people die from chronic kidney diseases in Britain each year. About 2,000 of these lives could be saved if sufferers were given dialysis treatment on artificial kidney machines. Such treatment normally necessitates patients being put on a dialyser for periods of twelve to fourteen hours twice a week for the rest of their lives—that is, for as long as the treatment works and, at present, a patient with chronic kidney failure can expect a maximum of twelve years' survival on a machine. The direct cost of an artificial kidney programme would be in the region of £80 million a year and it would also require the services of about 10,000 skilled personnel. These financial considerations raise fundamental questions as to medical priorities. Can the country afford to spend up to £2,000 a year keeping a kidney sufferer alive when there are so many other major medical problems to deal with? If there were no alternative a strong case could be made for such a financial programme. Kidney transplantation, however, is a cheaper alternative. Estimates of the cost of supplying and treating a patient with a spare kidney vary: one estimate is that it is about one-third the present annual cost of using a dialyser [3]; another, that the total cost is in the region of £6,000 per patient.[4] Both agree that kidney transplantation must be regarded as a better investment than long-term dialysis. Given the importance of financial considerations, it is clear that as long as the medical prospects for kidney transplantation are good there is a national need for it.

The transplantation of kidneys began in 1954 at the Peter Bent Brigham Hospital in Boston, Massachusetts, U.S.A. Today kidney transplantation has passed the development stage and is an established therapeutic measure. The general survival rate among kidney transplants is improving. Recent figures from the Human Kidney Transplant Register demonstrate a number of important points: first, the closer the relationship between the donor and the donee the greater is the chance of survival—the most successful transplants have been between identical twins; secondly, long-term survival rates are still not very good; thirdly, experience is an important factor in survival—clinics that perform ten or more transplants a year have a better survival rate than those who perform fewer than ten.

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[3] D. Longmore, *op. cit.*, pp. 176–177.

[4] B.M.A. Planning Unit. January 1969. Priorities in Medicine.

2. *The legality of surgical operations generally*

To determine the legality of live donor transplantations it is first necessary to examine the legal basis for surgical operations generally. Under medieval law, a person committed the crime of mayhem (maim) if he so injured another as to make him less able to fight or to defend himself or to annoy an adversary. To amputate a limb, even with the victim's consent was, on the face of it, an unlawful act, since it deprived the king of a fighting man. In early Victorian times when soldiers, as part of their training, had to bite cartridges, a soldier got a dentist to pull out his front teeth to enable him to avoid training and it was thought that both were guilty of a crime.[5] The modern law is obscure but the crime, to some extent, turns on two interconnected factors. The first is the nature of the physical harm: one person does not have a licence to mutilate or cause bodily harm to another for any purpose merely because that person has consented. The degree of bodily harm is, of course, important: the test is no longer whether it impairs or may impair the victim's ability to fight for his country, but presumably the seriousness of the harm must be of that order. " Bodily harm . . . includes any hurt or injury calculated to interfere with the health or comfort of the prosecutor. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient or trifling." [6] The second factor involves questions of public policy. The law may permit some kinds of assault and battery but not others: the dividing line between the permissible and the impermissible is not clear but the courts have accepted and still accept the burden of safeguarding individuals even against themselves.

The relevance of this aspect of the criminal law is that it provides a basis for saying that many surgical operations are prima facie unlawful. Without further justification not only would operations be criminal acts, but they would also be unlawful in the civil law and surgeons might be liable to pay compensation for the consequences of their acts, even though they had exercised all reasonable care. What are the criteria, then, which convert unlawful acts into lawful surgical operations? In some countries the criminal codes absolve from responsibility persons who perform in good faith and with reasonable care and skill a surgical operation upon another person, with his consent and for his benefit, if the performance of the operation is reasonable in the circumstances. No such provision appears in any United Kingdom legislation but it is clear, of course, that surgery, within limits, is a perfectly legal activity. Sir James Fitzjames Stephen formulated the general proposition that " everyone has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself "[7] and stated that although he knew of no authority for this, the existence of surgery as a profession assumed its truth.

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[5] Smith and Hogan, *Criminal Law* (2nd ed.), p. 256.

[6] *R.* v. *Donovan* [1934] 2 K.B. 498, 509.

Until recent developments in medical science, it would have been fair to maintain that surgical operations were lawful if four conditions were satisfied:

(i) *The patient must give a full, free and informed consent.* The importance of consent cannot be overemphasised. American and Canadian courts have examined the nature of legal consent in surgical cases to a far greater degree than courts in England. It is clear that, in any common law jurisdiction, the general principle is that a patient should be informed of all the material facts relating to the operation which would enable a reasonable person to weigh up the risks and benefits and arrive at a rational decision whether or not to undergo the operation. Also, there should be no unfair pressure upon the patient which induces him to give his consent in spite of all the risks.

(ii) *The operation must be therapeutic: it must be expressly for the patient's benefit.* The major distinguishing feature between surgical operations and unlawful mutilation is, of course, that all surgical operations are allegedly in the medical interests of the patient. Coke refers to a case in 1603 where " a young and lustie rogue prevailed upon a friend to cut off his left hand, so that he might be better able to beg."[8] Both were found guilty of the crime of maim; today, they would also be criminally liable. In the criminal codes of some countries, the provisions concerning surgical operations expressly state that they must be for the patient's benefit; in other countries this, until recently, has been accepted as being obvious.

(iii) *There must be lawful justification.* This is a relatively unexplored and open-ended requirement. Ethical and social questions are more relevant here and the courts may occasionally use this rubric to extend the law to meet new circumstances. Most surgical operations are lawful. The most obvious example of an unlawful operation is that of abortion because, apart from those cases where abortion is permissible under the Abortion Act 1967, abortions are statutory criminal offences, whether performed by doctors or unqualified persons. A doubtful operation in some cases, at least in law if not in practice, is that of sterilisation. Denning L.J. stated in 1954:

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[7] *Digest of the Criminal Law* (9th ed.), Article 310.
[8] *R.* v. *Wright* 1 Co.Lit.F. 127A–B.

> "When it is done with the man's consent for a just cause, it is quite lawful, as, for instance, when it is done to prevent the transmission of an hereditary disease; but when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities attaching to it. The operation is then plainly injurious to the public interest." [9]

It is likely that this judicial concept of the public interest has today been overtaken by events and that most forms of sterilisation will, subject to additional safeguards, be regarded as lawfully justified. There are other surgical operations, only arguably of therapeutic benefit to the patient, where the courts nevertheless may be tempted to emphasise their lawful justification. It is unlikely that the courts would condemn circumcision as unlawful. No doubt the ritual circumcision of Jewish infants could be upheld on grounds of religious toleration, although circumcision for non-religious reasons would have to be accepted on wider public policy grounds.[10]

(iv) *Generally, the operation must be performed by a person with appropriate medical skills.* This is a requirement which does not raise any problems in the context of the discussion in this article.

It has been suggested, convincingly, that it is time that the law's attitude towards surgery became more realistic:

> "An operation should be treated as a positive, beneficent, admirable action from the outset, not as a lawful infliction of harm. It is a cure, and only where essential elements are lacking in a situation does it become wrongful. After all we do not construe marital, or nowadays even extramarital, intercourse as rape licensed by virtue of consent and perhaps registration." [11]

As yet, however, English courts have not had the opportunity of considering this change of emphasis.

8. *Is it lawful to remove a kidney from a live donor?*

The legality of live donor transplants turns upon whether or not the first three conditions for lawful surgical operations are satisfied.

First, is the operation therapeutic? There is no doubt that the purpose of a kidney transplant is to benefit the donee. It seems equally clear that to take a kidney from a living donor can rarely be of any benefit to him. It is arguable that the donor who is left with one healthy kidney may be in no worse position than he is with two, since after a time the remaining kidney apparently does the work of two. Indeed, it may be that life insurance companies would accept an otherwise healthy donor as a normal risk. The difficulty, however, arises should anything happen to the solitary kidney: a kidney illness to a person with only one kidney is generally far more serious than to a person with two. A kidney transplant, then, in most cases can be of no therapeutic value to the donor.

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[9] *Bravery* v. *Bravery* [1954] 1 W.L.R. 1169, 1180, *obiter*.

[10] Glanville Williams, "Consent and Public Policy" [1962] Crim.L.R. 154, 157.

[11] David Daube in *Ethics in Medical Progress* (1966), p. 198.

Secondly, is there lawful justification for the surgical procedure? It has been suggested that the removal of a kidney from a healthy donor is not a maiming in the accepted sense because it is no great disability in most cases to lose one kidney. One calculation suggests that the total risk involved to the donor is 0.12 per cent., divided into an immediate risk of 0.05 per cent. as a post-operative accidental risk, and 0.07 per cent. as the risk of any kind of accident occurring later to affect the remaining kidney. Whether or not this can be said to be a maiming, it is most certainly the infliction of bodily harm which is capable of being more than transient or trifling.

Arguments, of varying force, can be put forward to support the view that such transplants are lawfully justified. Thus, the courts have by implication recognised the legality of some kinds of homografts; for example, the practice of taking blood from donors for the purposes of blood transfusions is incapable, without more, of being legally challenged today. The position of a blood donor and a kidney donor, although in some ways similar in kind, is, however, clearly different in degree. It is difficult to categorise the blood transfusion procedure as the infliction of bodily harm of more than a trifling or transient nature.

Perhaps a closer, though by no means close, analogy is that of skin-grafting. In an American case, *Bonner* v. *Moran*,[13] a court held a surgeon liable for trespass when a fifteen-year-old boy consented to skin grafts being taken from his body for the benefit of his badly burned cousin. The basis of the decision was that the boy was not old enough to give his consent, and his parents should have done so for him. By implication, it can be argued that the court would have allowed a non-therapeutic skin-graft had the proper consent been obtained.

Another argument is that the courts should treat a volunteer in this situation in the same favourable way as rescuers. A volunteer who risks his life or exposes himself to injury, for example, in rescuing a person from a fire, is not condemned for his actions if he has acted reasonably, nor are they regarded as unlawful; instead, he may be entitled to recover damages for any injury he suffers from the person whose negligence created the dangerous situation. The courts treat rescuers favourably: " danger invites rescue " is now an accepted phrase. If this is so, the law should look favourably on a volunteer donor so that the act would not be categorised as unlawful.[13]

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[13] 126 F. 2d 121 (1941).

These are merely some arguments which a willing court might use if it was prepared to restate the existing law to meet new medical trends. Speaking extra-judicially,[14] Edmund Davies L.J. has said that he would

> " be surprised if a surgeon were successfully sued for trespass to the person or convicted of causing bodily harm to one of full age and intelligence who freely consented to act as donor—always provided that the operation did not present unreasonable risk to the donor's life or health. That proviso is essential. A man may declare himself ready to die for another, but the surgeon must not take him at his word."

Until this issue is judicially or legislatively resolved, however, it is arguable in legal theory that the taking of a kidney from a healthy donor is normally an unlawful operation.

Thirdly, is there an informed voluntary consent? Even if the courts were to decide that live donor transplants were, within limits, lawfully justified, problems could arise in connection with the donor's consent to the removal of a kidney. In addition to all the strict requirements that the donor must be fully informed of all the relevant facts and risks, so that he can make up his own mind, difficulties may arise in those situations where the donor and donee are related. The relationship between donor and donee may be, for example, that of twins or parent and child: in these family situations the social and psychological pressures upon a person who knows that his failure to give consent will result in the death of the sick person must be very strong indeed. It may often be difficult to decide whether a consent in this situation is truly voluntary. It is true that where doctors are in doubt whether the donor's consent is in fact voluntary they may solve the problem (for the donor, at least, and his family, though not for the potential donee) by saying that the donor is medically unsuitable. Although the medical prospects are better where the blood relationship is closest, the chances of a truly voluntary consent are greater where the relationship is distant or non-existent.

As yet, there has been no litigation in England concerning the legality of live donor transplants. There is, however, some interesting American judicial reaction to these matters.[15] The first kidney transplants in 1954 at the Peter Bent Brigham Hospital in Boston were all between adult twins. Later, the possibility of transplantation arose between identical twins who were not adults: two sets of twins were aged fourteen and, in the third case, the twins were aged nineteen. Whereas the hospital was prepared to accept whatever legal risks might be involved in carrying out transplants between adults, it was much more exercised about the legal position of minors. Consequently, the hospital trustees and the surgical staff were advised in each case to apply to the court for a declaratory judgment.

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[13] *Cf.* however, Lord Devlin, *Samples of Lawmaking* (1962), p. 90: " The Good Samaritan is a character unesteemed in English law." See also *Siciliani* v. *Anna*, *infra*, p. 361.

[14] (1969) 62 Proc.Roy.Soc.Med. 633, 634.

[15] Curran, " A Problem of Consent " (1959) 34 N.Y.Univ.L.Rev. 891.

Although the three applications were heard by three different judges, the pattern of each was similar. On the question of consent, evidence was given that each donor twin was fully informed of the nature of the operation and had given his free consent; also, the parents consented. On the question of therapeutic value, the courts dealt with this in a surprising way. Evidence was brought forward by psychiatrists who had interviewed the donors that if the operation was not performed and the sick twin were to die, this would result in a " grave emotional impact " on the potential donor. This evidence was seized upon willingly:

> " I am satisfied from the testimony of the psychiatrist that grave emotional impact may be visited upon [the donor] if the defendants refuse to perform this operation and [the donee] should die, as apparently he will. . . . Such emotional disturbance could well affect the health and physical well-being of [the donor] for the remainder of his life. I therefore find that this operation is necessary for the continued good health and future well-being of [the donor] and that in performing the operation the defendants are conferring a benefit upon [the donor] as well as upon [the donee]." [16]

The effect of these decisions was that hospitals could carry out the transplant operations without incurring civil or criminal liability simply for doing so. The manner in which the decisions were reached, however, was highly unsatisfactory. First, the acceptance of psychiatric evidence that the operation was beneficial to the donor is artificial, to say the very least. The concept of " therapeutic benefit " has usually been restricted to something of direct physical benefit to the patient. Even if this reasoning is applicable when the donor/donee relationship is a family one, it becomes inapplicable where there is no blood relationship between the parties. Secondly, in the case of the two sets of twins aged fourteen, can it really be said that they were capable of giving informed consents? The position in English law is that parents have the right to consent to operations upon their children, certainly under the age of sixteen,[17] provided that the operation is therapeutic; children of fourteen may also be sufficiently mature to be able to understand the issues and give their own consent but, once again, only for truly therapeutic procedures. Parents, however, cannot be philanthropic on behalf of their children and the law must protect a child even against his own

[16] Curran, *supra*, p. 893.

[17] Family Law Reform Act 1969, s. 8 (1).

philanthropy. If these operations did not conform with what is ordinarily accepted as therapeutic, then it is doubtful whether any of the consents could be valid.

No doubt, however, the declarations granted in these three cases were precisely what all the parties wanted and there appears to have been little concern at the way in which the courts side-stepped the important issues of principle and left them in very much the same state of uncertainty as before.

In a more recent American decision, *Sirianni* v. *Anna*,[18] the theoretical nettle of the legality of a live donor transplantation was again avoided. The facts were that in 1963, after an ordinary hernia operation upon an adult patient, complications arose. Later, while the patient was under anaesthesia, three physicians agreed to remove a kidney. As a result of this operation the patient's one and only healthy, fused double kidney was removed without his consent or knowledge, and his life was sustained through the use of an artificial kidney. The plaintiff, the patient's mother, was told that the son could not survive long without a kidney transplant and that she was the only donor available. She consented to a transplant operation, which was performed successfully. The son, who survived for four years, brought an action against the three doctors for his injuries, and the claim was settled. Subsequently, the mother also sued the physicians alleging that her health had been impaired by the loss of one of her kidneys and claimed that not only did they owe a duty of care to their patient but also, if their actions necessitated her becoming a kidney donor, they also owed her a duty of care. The court held that no cause of action exists in favour of a donor of a human organ against defendants who removed vital human organs from the donee in a negligent manner, and refused to apply the rescue doctrine.

> " The miracle of modern medicine seems now on the threshold of successfully transferring many organs from one human body to another. The issue raised here may in future frequently find its way into the courts. This issue should be settled. If public policy requires that a donor is permitted to maintain a cause of action under the circumstances here, such cause of action must be created, not by judicial fiat, but by legislation." [19]

It is possible to challenge the reasoning in this judgment, but it is beyond the scope of the present article. What is relevant is that apparently the plaintiff in no way attempted to attack the defendants on the basis that the operation upon her, being non-therapeutic, was unlawful, or that her consent was not a real consent. Nor did the court consider this. By implication, or by default, support can be given for the legality of such operations.

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[18] 285 N.Y.S. 2d 709 (Supreme Court of New York, Niagara County, 1967). See Goldberg (1969) 18 De Paul L.Rev. 862.

[19] *Ibid.*, p. 718.

4. *Medical practice, the law and the future*

In legal theory then, the transplantation of kidneys or other organs from live, healthy donors could be attacked as being unlawful operations although the question is not free from all doubt. Medical practice has, by and large, progressed in this field without too much attention to the niceties of the law. But can surgeons ignore the strict legal position, confident that no legal proceedings will be taken against them unless they have been negligent? It may be true that the chances of criminal proceedings being brought against a surgeon are slight, but they cannot be ruled out entirely. If the donor dies during the operation or immediately afterwards there is, technically, a risk of a manslaughter charge. Similarly, it may be unwise to assume that a donor is unlikely to bring civil proceedings against the medical authorities, merely because he appears to have given his voluntary consent. If the health of the donor suffers, at the time of the operation or afterwards, he may feel aggrieved and take proceedings; if the donor dies, leaving dependants, financial factors may encourage litigation. *Sirianni* v. *Anna* could well be an indication of litigation to come.

Because of the uncertainty concerning the legality of live donor transplantation, it would be useful if the issues could be faced squarely by the courts. The procedure used in the American cases was to seek a declaratory judgment in specific cases. A similar speedy procedure might be desirable in England in any new medical procedure of doubtful legality or where the doubts concerning a fully informed consent were liable to create future difficulties. In this way the medical profession would know where it stood.

Some jurisdictions have already introduced legislation so as to put the question beyond doubt. Italy has a curious legislative history in this matter. As long ago as 1932 a case came before the Italian courts concerning a rich man who bought a testis from a young Neopolitan and had it transplanted by a surgeon. This apparently was lawful under the law of Italy at the time. As a consequence of this, the Italian Civil Code of 1940 prohibited the removal of a part or an organ of the human body which would permanently diminish physical integrity, while still permitting the donation of blood or skin. The provision in 1940 made it necessary to take express counter-steps when the Italian medical profession started its kidney transplantation programme in the 1960s, and so a new measure was enacted making lawful kidney transplantation into another person in order to save life when the donation is from an adult person.

Perhaps this story does point to one of the dangers of legislation. If Parliament is too quick to prohibit something it may find that it has to undo its prohibition. The new authority, confined only to kidneys, may also be too limited. It is claimed by some, therefore, that it is better to leave the whole matter vague and entrusted to the good sense of the judiciary if and when it is called upon to pass judgment. This is just as awkward an approach, and much less tidy. If live donor transplantation is going to be of any importance in the future, legislation is in fact the better answer.

Lord Kilbrandon has suggested that legislation should be introduced so that " any person of full age and capacity may consent, in writing, to any medical or surgical treatment which is to be carried out in a designated hospital, provided that the risks attendant thereon are not excessive and notwithstanding that the treatment is not being carried out for the benefit of the person himself." [20] There should also be adequate provision made to ensure that the consent is free and informed and also to prevent what may otherwise be a licence for excessive experimentation.

There is the question, however, of the future of live donor transplantation. This may well depend, in fact, upon the supply of adequate cadaver material and satisfactory medical and legal arrangements for transplantation from dead donors. Although the operative risks to the donor of a kidney are low, the effects are permanent. If there is a better and safer way of obtaining organs then this alternative solution should be adopted. It may well be, then, that it is too soon to legislate if the continuation of such procedures can be otiose and undesirable.

If there is such legislation, however, provision ought to be made about important financial issues.

The donor is a volunteer, and he ought to be well protected against accidents. Thus, there should be a compulsory insurance arrangement whereby the donor and his dependants are compensated for any loss suffered in the event of an accident resulting from the surgical procedure. Such compensation should extend to all consequences of the donation, no matter how long after the operation the harm occurs. It would, of course, be difficult to decide how to measure such compensation, for there are many people who risk their lives for the benefit of others who are not adequately compensated for their bravery. Yet this ought not to preclude such arrangements in this kind of situation. It is interesting to note that the problem of compensation was considered by the very first identical twin kidney donor in 1954. The donor, aged twenty-three, asked the doctors at the Peter Bent Brigham Hospital whether they would be willing to take care of him medically for the rest of his life if he gave his kidney. The reply was that they neither could nor desired to make a guarantee of this kind, although it was understood that it was unlikely that he would be refused medical care.[21] In England, the existence of the National Health Service means that there is no problem in theory as to continuing medical treatment. There may also be the usual social security benefits provided for the sick and unemployed.

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[20] *Ethics in Medical Progress* (1966), pp. 213–214.

[21] *Ibid.*, p. 18.

One solution would be to require the hospital to take out, at its own expense, an appropriate insurance cover for the donor. At the time of the operation the donor, of necessity, will be healthy and the risk involved in the operation negligible. This is the very kind of risk which insurance companies favour and so there ought to be little difficulty in this respect.

Not only should the donor be protected financially but society should also be protected against commercial exploitation of healthy organs. The prospect, in the future, of there being a market for organs is possible, though unsavoury. Where the demand for kidneys exceeds the supply, as it does now, it is possible for the Neapolitan situation to become commonplace. The wealthy may pursue the healthy and make enticing financial offers; the healthy may shop around for a suitable financial offer. It is generally agreed that this kind of market is undesirable and legislation should expressly prohibit it.

C. CADAVER TRANSPLANTS

1. *Introduction*

Because of the practical difficulties of obtaining organs from live donors, medical attention was directed to the possibility of obtaining organs from the bodies of dead donors. The practical advantages are obvious: the donor, once pronounced dead, is not exposed to any of the hazards which face the live donor; in some cases, such as heart or liver transplants, it is not possible to take organs from live donors; and the potential supply of organs from cadavers is much greater than from live volunteers. Practical difficulties also exist: until recently, although eyes could be " kept " for several hours after death all other organs had to be taken and used within an hour of death; even with rapid medical progress it will be desirable for some time to come to perform the operation as soon as possible after the death of the donor.

2. *The existing law*

(a) *Common law.* The common law position concerning corpses is curious but relatively well established. A corpse cannot ordinarily be the subject of ownership.[22] Usually the executor or next-of-kin will have lawful possession of the body and there is a duty to arrange for burial at the earliest opportunity. It follows that, at common law, a man cannot by his will, or otherwise, legally determine what shall happen with his body after his death, although in most cases his wishes concerning the disposal of his body will be observed. That does not, of itself, authorise organs to be taken from corpses for the purpose of transplantation.

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[22] *Williams* v. *Williams* (1882) Ch.D. 659. The position is different if the corpse acquires attributes as to justify its preservation on scientific or other grounds: *Doodeward* v. *Spence* (1908) 6 C.L.R. 406. University College, London, presumably owns the body of Jeremy Bentham.

(b) *Statute.* The need for human bodies for medical purposes is not new: bodies have always been required for anatomical teaching and research. But any attempt on the part of persons in possession of a body to sell it, even for the purpose of dissection, was unlawful; the bodies of persons convicted of murder were alone capable of being used for dissection. The scandals of body-snatching and the publicity of the murder trial of Burke and Hare led to the passing of the Anatomy Act 1832, which enabled bodies to be supplied legally to medical schools for the purpose of anatomical examination. The demand for corpses was then successfully met for over a century.

It is only in recent times that the medical profession realised that the law relating to cadavers was far too restrictive. The successful development of the corneal graft operation focused attention on the lack of supply of eyes and the inability of potential donors to bequeath their eyes for such purposes. In a little debated, but carefully prepared, piece of legislation the Corneal Grafting Act 1952 (the wording of which to some extent followed the Anatomy Act 1832) was passed authorising the use of eyes of deceased persons for therapeutic purposes. This Act quickly proved to be too narrow, for it did not enable any other part of the body to be removed. However, once this kind of provision was on the statute book, it was much easier to extend it. The Human Tissue Act 1961 replaced the 1952 Act and authorised, in certain circumstances, "*the use of the body or any specified part of the body after death for therapeutic purposes or for purposes of medical education or research.*" [23] This Act, which provided a model for many other jurisdictions, at present governs the English law relating to cadaver transplantation.

An examination of some of the provisions of this short statute will demonstrate the difficulties which recent transplantation procedures have exposed.

(c) *The power to donate a body for medical purposes.* There are two provisions dealing with the power to donate. The first deals with the situation where the donor expressly authorises such use before his death:

> "*If any person, either in writing at any time or orally in the presence of two or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request.*[24]

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[23] Human Tissue Act 1961, s. 1 (1).

[24] *Ibid.*

The donation of one's body or part thereof is not required to be in the form of a testamentary disposition; any written request, even though not witnessed, will be sufficient, as also is a duly witnessed oral death-bed request. Indeed, a direction in a will without more would in most cases be useless, since wills are normally looked at some time after death, and usually this would be too late for the deceased's organs to be of medical use. The need for speedy communication is paramount and where a person does include a therapeutic bequest in his will it is considered advisable for the donor's doctor and his close relatives to be informed,[25] and also for the request to be recorded separately. The Automobile Association went so far as to publish for its members a form "Consent to Medical Use of Body in Event of Death" which it suggested should always be carried on one's person.[26] Some people, who found such invitations to cannibalisation odious, were tempted to carry about forms expressly forbidding their bodies to be used in the event of their deaths. The reason for this express prohibition will be seen shortly.

It should be noticed that the person lawfully in possession of the body is not bound to carry out the deceased's wishes: he is empowered but not obliged to act. Thus, if he has any reason for withholding permission, rational or not, he can do so.

The second provision deals with the more common situation at present where the deceased has not made an express request:

> "... *the person lawfully in possession of the body of a deceased person may authorise the removal of any part from the body for use for the said purposes if, having made such reasonable enquiry as may be practicable, he has no reason to believe—*
>
> (a) *that the deceased had expressed an objection to his body being so dealt with after his death, and had not withdrawn it; or*
>
> (b) *that the surviving spouse or any surviving relative of the deceased objects to the body being so dealt with.*" [27]

There are several parts of this section which give rise to difficulties. First, who is "the person lawfully in possession of the body"; secondly, who are the surviving relatives who may object; thirdly, what inquiries should the person lawfully in possession of the body make in order to comply with the Act?

The expression "person lawfully in possession of the body" had its origins in the Anatomy Act 1832 which referred to "the executor or other party having lawful possession of the body." [28] Under that Act it has been held that the master of a workhouse was the person having lawful possession of the body of a pauper who had died there.[29] It would seem, therefore, that until the next-of-kin or the executors of a deceased claim a body a hospital authority would be lawfully in possession of it for the purposes of the Human Tissue Act[30] and the Departments of Health have advised that in the case of deaths occurring in hospital, until relatives claim the body, the person lawfully in possession of the body is the hospital management committee or board of governors or anyone designated so to act on their behalf.[31]

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[25] *Encyclopaedia of Forms and Precedents* (4th ed.), Vol. 4, p. 36.

[26] *Drive*, 1968.

[27] Human Tissue Act 1961, s. 1 (2).

[28] Anatomy Act 1832, s. 7.

[29] *R.* v. *Feist* (1858) Dears and Bell 590.

Hospitals, therefore, potentially have considerable powers to use bodies, subject only to the wishes of relatives. This section indicates that the surviving spouse or any other relatives may object, but no definition of surviving relatives is given. In other legislation where "relative" is expressly defined the word is given a very wide meaning and sometimes includes all relatives of the full blood or half blood, and adopted and illegitimate children[32]; equally wide meanings have been given to the word in wills.[33] The Ministry of Health circular which advises that the word "should be interpreted in the widest sense to include those who claim a quite distant relationship"[34] is therefore wise in both practice and law.

The paradox of the section now becomes apparent. The hospital may have, and may wish to make immediate use of, a body, but whom do they consult? If the identity of the deceased is not known can the body be used? If the surviving spouse or other close relatives expressly consent, must the hospital fear a more distant relative claiming that he would have objected had he been consulted in time? The only guidance given to the hospital is that it may act provided it has made such reasonable inquiry as may be practicable. Where the identity of the deceased cannot immediately be ascertained or the close relatives of a deceased immediately contacted then it would be very dangerous for the hospital to deal with a body. Experience in other countries has shown that irate relatives are prepared to take proceedings against medical authorities who have not contacted them. The reply that it would not be practicable to spend too long trying to trace relatives since the body must be used within a short time after the death would not be decisive. The practicability of the inquiry must relate to the steps taken to trace the relatives not to the practicability of using the body, since the basis of the provision is to allow the relative to object if he so wishes. Where a close relative is available and does not object then the medical authorities are on slightly safer ground in proceeding in spite of the possibility that other relatives who were within the range of immediate contact and who were not consulted might object and claim that the use of the body was unlawful. It is clear, however, that a hospital will rarely be in a position to guarantee that it has made all reasonable inquiries if the body is used within a few hours of death.

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[30] This view is supported by s. 1 (7): "In the case of a body lying in a hospital, nursing home or other institution, any authority under this section may be given on behalf of the person having the control and management thereof by any officer or person designated for that purpose by the first-mentioned person."

[31] Circular H.M. (61) 98.

[32] *e.g.* Adoption of Children Act 1949, s. 13; Adoption Act 1958, s. 57 (1); Births and Deaths Registration Act 1953, s. 41; General Rate Act 1967, s. 9.

[33] *e.g.*, *Eagles* v. *Le Breton* (1873) 42 L.J.Ch. 362, 363; *Re Nash* (1894) 71 L.T. 5, 6.

[34] Circular H.M. (61) 98.

The possible amendment of these provisions will be discussed later.

(d) *The determination of death.* The Act provides for the removal of organs from deceased persons and states that "*no such removal shall be effected except by a fully registered medical practitioner, who must have satisfied himself by personal examination of the body that life is extinct.*"[35]

This raises the fundamental and controversial question as to the meaning of death and when it occurs.

For a very long time the standard medical definition of death was "the apparent extinction of life, as manifested by the absence of heartbeat and respiration."[36] As long as this definition was generally accepted there were no major legal difficulties. Whether or not a person was dead depended on proof and a court would accept the medical evidence. But this definition is now regarded as obsolete: persons without heartbeat and respiration may be regarded as alive; persons with heart beat and respiration but irreparable brain damage may be regarded as dead. The doubts of the doctors create doubts in the law. The doctors are in a dilemma: when they know that a person is dying they may wish to act quickly to obtain from the body the necessary organs; this creates a psychological incentive to certify death as early as possible. The patient, or frequently his relatives, clutch at the last vestiges of life. The dilemma has been expressed in these terms:

> ". . . medicine and humanity can no longer afford the luxury of condemning to the grave the vital organs which if transplanted into another person can preserve that person's life. The law must protect the physician by laying down the rules under which the science of transplanting may progress, and yet preserve unto the dying the basic rights of humanity."[37]

One of the major sources of transplant material is from persons who have been brought into hospital dying as the result of accidents, in most cases road accidents. Public fears were aroused at the possibility of such persons being "used" rather than "treated" prior to death. In the first heart transplant in Britain publicity was given to the uncertainty of the time of death of the donor, who had suffered brain damage in a building site accident, and to a statement attributed to a surgeon at the National Heart Hospital that, at some stage, he was "clinically dead, but legally alive by some criteria."[38] One doctor criticised his colleagues in these terms: "As soon as one has a patient with useful organs one has a gang of vultures trying to snatch out these organs, ranging from the cornea to the heart."[39]

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[35] Human Tissue Act 1961, s. 1 (4).

[36] *Dorland's Illustrated Medical Dictionary* (24th ed.) 1965.

[37] Wasmuth and Stewart, "Medical and Legal Aspects of Human Organ Transplantation" (1965) 14 Cleveland-Mary L.R. 442, 466.

The confusion between "medical death" and "legal death" can be seen in a report of one of the rare cases in England where the matter has been considered in a court. The case, *R.* v. *Potter*,[40] concerned a man who had been butted in a fight and had fallen backwards and injured his head. Fourteen hours after his admission to hospital he stopped breathing and he was connected to an artificial respirator. Twenty-four hours later, a kidney was removed (with his wife's consent) and was grafted into another man.[41] The respirator was then disconnected and it was found that there was no spontaneous respiration or circulation of the blood. At the subsequent inquest a medical witness stated that the man had *virtually* died at the time when he was put on the respirator, although it would be legally *correct* to say that death did not occur until twenty-four hours later, when breathing and the heartbeat had ceased. A neuro-surgeon said that there was no hope of survival from the brain injury and that the patient had only been put on the respirator because a kidney was wanted for transplanting. The question for the coroner at the inquest was whether the assailant had caused the death and should be committed for trial for manslaughter. The jury found that the removal of the kidney had not contributed to the death and the assailant was committed for trial. The confusion in this report could have serious legal implications. If the man was not legally dead until the respirator was removed, then the kidney had been taken from a person before life was extinct: this, at the very least, would be a criminal assault. Whether or not there could be more serious charges of manslaughter or murder for the death of the person would involve other more complicated causation issues. No doubt, if the matter had been presented in another way the evidence could have shown that death had occurred medically, and therefore legally, at a time before the person was put on the respirator.

The publicity given to the question of the time of death, and the confusion in the minds of some medical people concerning a possible division between medical and legal death, has led to demands for a legal and medical clarification of the entire question. The ascertainment of the precise moment of death is desirable not merely for the purposes of transplant procedures but also in other areas of the law; for example, it could be relevant in cases concerning succession to property or liability to estate duty.[42] The reaction to the demand for a new definition will be considered later.

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[38] *The Times*, May 7, 1968.

[39] Dr. G. Spencer, *The Times*, September 11, 1968.

[40] (1968) 31 *Medical Legal Journal* 195.

[41] The Coroner had consented to the removal under s. 1 (5) of the Human Tissue Act 1961: "Where a person has reason to believe that an inquest may be required to be held on any body or that a post-mortem examination of any body may be required by the coroner, he shall not except with the consent of the coroner,—(a) give an authority under this section in respect of the body."

A case like *R.* v. *Potter* raises other questions concerning the duties of the donor's doctor towards his dying patient. Presumably, there is nothing unlawful in deciding not to put a dying person on an available respirator to prolong some kind of vegetable life. If a patient is put on a respirator, however, does this mean that life is preserved? If so, how long should the doctor keep him on it and attempt to maintain life? If the doctor stops the machine when the patient is breathing, is this murder, or can it be said that the irreversible brain damage in some way justified stopping the machine? What cannot be said, of course, is that the patient was "kept alive" until such time as the organs could be taken from him for transplantation. One solution to this problem has been given by the Pope, who has suggested that there is a distinction between ordinary and extraordinary means of saving life:

> ". . . the respirator and other systems for aiding circulation were *extraordinary* systems of prolonging life, not ordinary systems. The physician can give ordinary treatment but is not obliged to give extraordinary treatment. If the family tells the physician to stop the respirator and if the physician thinks that there is no hope of life being prolonged he can stop the respirator with a clear conscience. The principle here is of double effect. Stopping the respirator does not cause death, because death results from another cause, the disease or injury."[43]

It will be noticed, however, that even on this analysis it is arguable that the donor is made to die only when the donee is ready to receive the appropriate organs. While medical opinion is confused the law will also be uncertain. Confusion is bound to persist if the law permits the same doctors to be concerned with the ascertainment of the death of the donor and also with the transplant to the donee. Medical practice is yielding to the pressure of public opinion and is insisting upon independent certification of death by doctors not connected with the transplant team; demands have also been made that such a requirement should be introduced into the law. This will be discussed later.

3. *The proposals for reform*

The Human Tissue Act 1961 has been shown to be unsatisfactory in a number of respects. The publicity given to cardiac transplantation and the demand for more organs for medical use, together with public concern over such matters as the definition of death, resulted in demands for the entire law to be reviewed and to be brought up to date to meet the legitimate needs of modern society. Several guiding principles were put forward: first, a reputable and, in skilled hands, proven technique of saving life should not be held back by obsolete law; secondly, the supply of organs for established forms of transplantation must be increased to serve the dual aims of enabling surgeons to treat more patients and improving the prospects of longer survival of the patient because a good match has been secured; thirdly, the public has the right to safeguards and has a right to know that there are safeguards.[44]

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[42] *Cf. Thomas* v. *Anderson*, 211 P. 2d 478 (1950, California District Court of Appeal); *Smith* v. *Smith*, 317 S.W. 2d 275 (1958, Supreme Court of Arkansas).

[43] Pius XII: The Prolongation of Life, *Pope Speaks* 4: [illegible] (No. 4) 1958; *Ethics in Medical Progress*, 1966, Appendix 4.

Demands to amend or replace the Human Tissue Act came from many sources. Sir Gerald Nabarro M.P. unsuccessfully introduced Renal Transplant Bills in 1968 and 1969 designed to deal only with the relatively well-established procedures of renal transplants but excluding, for the present, the more controversial area of heart transplantation. The Minister of Health was sympathetic but was more concerned to deal with the whole question of transplantation. A Government Committee was set up and made various proposals in 1968 [45] and then the Health Ministers in 1969 set up an Advisory Group (the MacLennan Advisory Group) to advise on any problems arising in the field of transplantation which are of public concern. The first task was to consider any desirable amendments of the Human Tissue Act. The Advisory Group reported in 1969 [44] and more recently a Special Committee of Joint Consultants has stated its views.[46]

Whilst this debate about legal reform in England is still proceeding, other jurisdictions whose laws in this respect were either based upon or were similar to those in England, have introduced legislation which brings the law into line both with medical realities and public opinion.

One of the most thorough examinations of the problems was by a Committee of the American National Research Council which drafted a Uniform Anatomical Gift Act. The Act was approved by the National Conference of Commissioners on Uniform State Laws in July 1968 and has been enacted in many States in the U.S.A.

The main areas of possible reform relate to the matters which have been examined already. These will be discussed and, where appropriate, reference will be made to the provisions of the American Uniform Act.

(a) *Who should have the power to authorise the use of organs?*

(i) THE "CONTRACTING OUT" SCHEME. A radical proposal for obtaining organs and avoiding all the difficulties of obtaining authority under the present law, or any revised law, is to have a scheme of "contracting out." This means that surgeons would have power to remove organs from all persons save those who had expressly registered their unwillingness for their organs to be used after their death in transplant procedures.[47] The relatives, of course, would have no legal right to object. This proposal was advocated in an unsuccessful Organ Transplants Bill introduced by Norman St. John Stevas M.P. in 1969: priority should be given to social and human need rather than the feelings and wishes of survivors, although due allowance was to be made for those people, such as Jehovah's Witnesses, who had religious or other conscientious objections to such procedures. The Special Committee unanimously felt that in the present climate of public opinion any attempt to legislate on the basis of contracting out would be premature, and, if pressed, might well jeopardise the future of transplant surgery:

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[44] Advice from the Advisory Group on Transplantation Problems on the Question of Amending the Human Tissue Act 1961, Cmnd. 4106, para. 3.

[45] H.C.Deb., Vol. 767, cols. 49–50. June 25, 1968.

[46] Report of the Special Committee on Organ Transplantation (1970) 1 *British Medical Journal* 750.

> "Organ transplantation is by no means universally accepted by the public. The circumstances in which a transplant operation is most likely to take place—sudden or accidental death of a young and otherwise healthy person, and the need for an immediate decision if use is to be made of any of his organs—are such as to give rise to a strong emotional reaction. Any attempt by a surgeon to carry out a transplant operation in the face of opposition by bereaved relatives, even with the law on his side, would be likely to provoke a hostile public reaction." [48]

The American Committee proceeded on the same assumption. This cautious approach is surely sound.[49] It does, however, throw one back again on the appropriate persons to make decisions.

(ii) THE RIGHT TO DONATE ONE'S OWN BODY. The Advisory Group were unanimously of the opinion that an individual's wishes as to the disposal of his own organs after death should have absolute primacy and override all others. This would involve a slight amendment to the Human Tissue Act since the person lawfully in possession of the body can withhold authorisation even where the deceased has made an express request. In this way the wishes of the deceased can be overruled if, for example, a relative objects. With a change in the law, the relative's feelings would have no legal significance. The American Uniform Act [50] provides that any individual of eighteen years of age or more may, before death, donate all or any part of his body, the gift to take effect upon death. Here, the relatives' wishes may also be ignored legally. The Special Committee, however, questioned whether the wishes of a close relative should ever be overridden, even in the face of proof of willingness on the part of the donor, although it recognised that such proof might be valuable in influencing the views of a relative. There is much to be said for giving some weight to the feelings of survivors. Even now, a testamentary direction as to cremation does not create a binding legal obligation.

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[47] See a similar proposal by Lord Kilbrandon, *Ethics in Medical Progress*, (1966), p. 212.

[48] (1970) 1 B.M.J. 750.

[49] The Special Committee's view has, however, been said to demonstrate a "naivety and ignorance that are lamentable. . . . A change in the law with provision for 'contracting out' is the only way in which there can be a solution to the shortage of donor organs. This was accepted by the majority of the [Advisory Group] and legislation along these lines has already been adopted in Denmark, France, Israel, and Sweden." R. Y. Calne (1970) 2 B.M.J. 111.

[50] s. 2 (a).

The problem, in practice, of course, is to persuade a substantial number of people to make decisions during their lives either to donate their bodies (contracting in) or to contract out and to arrange for such views to be recorded in such a way that delay will not destroy the effectiveness of the donation. The Committee supported, as an experimental measure, a system of double contract. By this is meant a single public and central register for both consents and objections recorded during life. This would have the advantage, from the point of view of the public, of recording their wishes either way, and of indicating the movement of public opinion to the further end of enabling the authorities to judge when any further action might be acceptable. Telex linkage between hospitals and the central register would enable prompt ascertainment of whether or not the victim of a fatal accident or illness had enrolled as a donor.[51]

(iii) NEXT-OF-KIN AND "PERSONS LAWFULLY IN POSSESSION." Until there is widespread public acceptance, in practice as well as in theory, of the need to make an express decision during one's life to donate organs, it will be true that in the majority of cases nothing will be known about the deceased's wishes. Who should be able to determine whether these bodies may be used? At present the matter must be resolved between the relatives and also the "person lawfully in possession of the body" (if not related to the deceased). There is a need both to amend the ambiguities in the Human Tissue Act in this respect and to make a policy decision as to the precise powers of the relatives. The first clarification suggested by the Advisory Group is to confirm that "the person lawfully in possession of the body" is the hospital authority during the time between death and the time when the next-of-kin or executors claim the body. The Royal College of Pathologists dissented from this view and thought that the hospital authority should only have this status if no relative can be traced. This appears to be based upon a concern for the rights of the relatives in the event of the hospital authority acting without consultation or against their wishes.

It has been seen that under the present law, objection to the use of a body can be made by any relative, no matter how distant.

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[51] See Central Ethical Committee of British Medical Association: *Ethics of Transplantation*, April 1970.

The Advisory Group suggested that the Act might be amended so that the next-of-kin with a right to be consulted should be precisely defined. The American Uniform Act provides that after death (or in some cases immediately prior to death) the next-of-kin may donate the body, and the next-of-kin are specified in the following order of priority[52]: the spouse; an adult son or daughter; either parent; an adult brother or sister; a guardian; and, last, any other person authorised or under obligation to dispose of the body. For example, if the spouse is not available at the time of the death, an adult son or daughter may give authority for the body to be used. In this situation, the objection of a parent of the deceased would have no legal significance, although the medical authorities might on other grounds be reluctant to proceed. If there is actual notice of contrary indications by the deceased or that a gift by one of the class of next-of-kin is opposed by a member of the same or a prior class, the donee has no power to accept the gift. It can be seen that, if this procedure was introduced into the Human Tissue Act, there would be little problem about hospital authorities who claimed that they were " lawfully in possession of the body "; they would be last in the order of priority, and would always have to obtain the consent of a member of the prior class of next-of-kin if available; only if none of these people were available at the time of death would the hospital authority have the power to make the decision that the body should be used. The introduction of an order of priority for relatives seems a necessary measure from the point of view of the medical authorities who require certainty, although there is still the possibility in theory of clashes of view beween relatives of different degrees of priority.

(b) *Donees and purposes for which donations can be made.* The Human Tissue Act simply states that the body may be used " for therapeutic purposes or for purposes of medical education or research . . . in accordance with the request." The American Uniform Act spells this out in more detail.[53] Donations may be made to any hospital or medical or dental school, surgeon or physician for education, research, advancement of medical or dental science, therapy or transplantation. Donations may also be made to any specified individual for therapy or transplantation needed by him. Provision is also made for the donee of all or part of a body to have a right to any examination necessary to assure medical acceptability of the gift for the purposes intended. The Act does not deal with the question of whether it is possible for payment to be taken for a donation. The ethical and social problems which might arise if a market in organs were permitted has led some jurisdictions rightly to prohibit the sale of parts of the body for such purposes.[54]

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[52] s. 2 (*b*).

[53] s. 3.

[54] *e.g.* South Africa.

(c) *The manner of making the gift.* The American Uniform Act imposes stricter requirements than those already in force under the Human Tissue Act. The deceased, prior to his death, may make a gift by will or any written instrument (including a card designed to be carried on the person) and if witnessed by two persons, such a gift becoming effective upon death.[55] If probate of the will is not granted or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective. In England, it is possible to make a written, unattested gift and, in some cases, an oral disposition. There seems to be no case for changing these rules. It has been observed already that in most cases at present it is the next-of-kin who authorise bodies to be used for transplantation, and the American Act provides a means of speedy consent by authorising the specified relative to sign a document (with no requirement for it to be witnessed) or to make the donation by telegraphic, recorded telephonic or other recorded message. Such a clarification may be usefully incorporated into the Human Tissue Act.

(d) *Should there be a legal definition of death?* Now that the erstwhile standard definitions of death are no longer medically valid, considerable attention is being paid to whether or not a satisfactory modern definition is possible. For example, in 1968 an Ad Hoc Committee of the Harvard Medical School suggested irreversible coma as a new criterion of death.[56] In order to alleviate public concern it has been proposed that a suitable set of criteria of death should be written into the Human Tissue Act. Both the Advisory Group and the Special Committee opposed this on the ground that determination of death is a clinical matter: there is no distinct group of clinical signs which, on each and every occasion, signify that death has occurred, without possibility of error; the determination of death must be a matter of the individual doctor's judgment.[57]

Although, from time to time, newspaper stories do indicate that medical judgment of death is not always sound, it is probably right to exclude medical definitions of this kind from legislation. What is far more important, however, from the public point of view, is the question of the procedure which ought to be adopted to allay fears of doctor's conflict of interest between the patient and a waiting donee. The Advisory Group recommended a number of safeguards. First, the doctor clinically responsible for the care of a potential donor should always be different from the doctor clinically responsible for a prospective recipient. Secondly, before organs are removed, death should be certified by two doctors, one of whom should be at least five years registered, each independent of the transplant team and without regard to the possibility of a transplant. Thirdly, in cases where resuscitation is being maintained by artificial means, the decision to continue or discontinue such support must be reached without regard to the possibility of a transplant. The Report of the Harvard Medical Committee recommended that the patient be declared dead before any effort is made to take him off a respirator, if he is then on a respirator. This avoids the risk of physicians being charged with killing a patient by turning off a respirator on a person who may otherwise under a restrictive application of the law be deemed alive. The fourth recommendation advocates that a prospective donor should never be moved between hospitals merely in the interests of a prospective recipient. If there is a need for transfer, the recipient should be moved to the donor. The unfavourable public comment in connection with recent heart transplants confirms the soundness of this proposal.

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[55] In the interests of respecting the final wishes of the donor, s. 6 provides less formal ways of amending or revoking the gift.

[56] "A Definition of Irreversible Coma" (1968) *Journal of the American Medical Association* 337.

[57] (1970) 1 B.M.J. 750–751. This follows the views of the World Medical Association expressed in August 1968.

It is questionable whether, if no statutory definition of death is formulated, these peripheral safeguards should form more than part of an agreed code of medical practice.[58] In so far as the requirements are likely to be permanent there is a case for incorporating at least some of them in the Human Tissue Act. The American Uniform Act does not attempt to define death but does provide safeguards against possible conflicts of public interest by prohibiting the physician certifying death from participating in the removal or transplantation procedures.[59]

(e) *Legal protection.* The uncertainties in the Human Tissue Act mean that there are always possibilities of criminal, or, more likely, civil proceedings being brought in connection with transplantation procedures. Apart from clarifying the Act, it would also be desirable to make express provision for the protection of the medical persons who do expose themselves to these risks and worries. The American Uniform Act provides that if the terms of the Act are complied with, a person who acts in good faith is not liable for damages in any civil action or subject to any criminal proceedings for his act. This measure could usefully be introduced into the Human Tissue Act.

D. CONCLUSIONS

The public interest in transplantations has brought to the fore all the medical, legal, ethical and social issues which, to a greater or lesser extent, continually arise in the course of medical progress: the difference is that the problems now seem to be greater. The rights of the sick and the dying, the respect for life, ethical standards, all must be safeguarded; however, medical advances must not be hindered unnecessarily. In the past the law has tried to maintain a balance, not always entirely successfully, in the ordinary surgeon-patient relationship, but recent advances have raised the question whether they have outpaced the common law's capacity for change.

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[58] *e.g.* see the Ethical Code published by the British Medical Association, April 1970.

[59] s. 7 (*b*).

One way of redressing the balance is to change certain areas of the relevant law, for example by amending the Human Tissue Act in the way discussed in this article.

Another way, however, is to take a much more fundamental look at the entire legal framework relating to medicine, with a view to creating a new framework which is realistic in meeting the reasonable demands of the medical profession and the individual. The surgeon may be working for the benefit of mankind but individual rights must not be overlooked. If the over-enthusiastic surgeon should be kept in check the legal and ethical boundaries must be relatively clear and capable of being assessed objectively. A new legal framework could both deal with some of the basic misconceptions in legal theory, for example, that surgical operations are presumptively unlawful unless they can be justified, and also with the more important modern problems, which have also arisen in connection with transplantation but which are equally applicable in other areas of medicine. Thus, cardiac transplantation has raised but not decided the entire question of the right of the medical profession to carry out medical experimentation upon human beings. Various ethical codes concerning experimentation have been laid down, but the law relating to experimentation is by no means settled. There is certainly an argument that cardiac transplantation has been carried out by some doctors for primarily experimental rather than immediate therapeutic objectives, the legality of which is by no means clear. Similarly, today medical progress is carried out in the face of consistent public interest. The mass media are prepared to hail, discuss, criticise and condemn new techniques without always paying due regard to the wishes of the medical profession or of the patients and their relatives who may desire, in time of grief, the anonymity to which a right of privacy, if it were the law, might entitle them.

There is therefore a very strong case for advocating the creation of a widely representative committee charged with the task, first, of codifying the law relating to modern medicine so that it is understandable and acceptable to the medical profession and the public, and secondly, of keeping under continuous review the effectiveness of such a law in the light of socially desirable medical practice.

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VARIATIONS ON AN ENIGMA

In *Baker* v. *Willoughby*[1] the defendant, who was driving his car negligently, knocked down the plaintiff causing him severe injury to his left leg and ankle. This was in 1964. With some difficulty the plaintiff found employment sorting scrap metal and, one day in 1967 while so engaged, he was shot in the left leg by two men who demanded money from him. As a result of this shooting the plaintiff's left leg had to be amputated and he had to wear an artificial limb. The plaintiff's disability was somewhat greater than it would have been if the second injury had not occurred.

The plaintiff's action against the defendant came to trial in 1968. The plaintiff claimed that the damages payable to him in respect of the 1964 accident should in no way be decreased by the fact of the second injury; the defendant argued that by reason of the 1967 shooting and resulting amputation the damages should be limited to those relevant to the period between the two injuries. The House of Lords upheld the plaintiff's claim and decided that the second injury did not operate to cut down the damages to which the plaintiff was entitled in respect of the first injury.

The two short articles which follow deal with the issues raised in the judgment and related matters.

SUCCESSIVE CAUSES OF PERSONAL INJURY

It seems hardly worth saying that, in order to impose upon a person liability in tort for an injury, his conduct must have contributed to the occurrence of the injury; the need to satisfy the test of *causa sine qua non*—to use the conventional terminology—appears self-evident. Of far greater importance is the proposition that proof of such causal connection is never enough to impose liability because the law, as has been said since Bacon's day, pays no regard to remote causes but only to proximate causes, and it is of course around the policy issue of what is remote and what is proximate that the familiar discussions have raged. However, in the background of these discussions, there remains always the assumption that for conduct to be a *causa sine qua non* of injury is a necessary, if not a sufficient, condition of liability.

Yet the assumption has its dangers. For there are certain exceptional situations in which the law may wish to regard a defendant as having caused an injury even though it would have occurred without his participation. Thus, to take the simplest case, where the concurrent negligent acts of two persons combine to cause a single injury which the act of either would have sufficed to bring about by itself, neither actor should be able to escape liability on the strength of the argument that the injury would have been inflicted even in the absence of his negligent conduct: each should be held liable for the total injury.[2] Where, however, the two causes are successive rather than concurrent, the situation becomes more complex, because it gives rise to an issue of damages as well as an issue of causation: for it is necessary to deal not only with the imposition of liability but also with the degree of loss, and hence the amount of damages, for which each actor is to be held liable. This problem of successive causes is here examined in the context of personal injury because of the measure of disagreement as to its proper solution which has been revealed by the recent case of *Baker* v. *Willoughby*,[1] the facts of which are set out above.[3] In that case it was accepted on all sides that the fact that the plaintiff's leg had subsequently been amputated as a result of the shooting incident could not be ignored, and there is indeed universal acceptance of the sensible and realistic rule that courts must look at the position at the time of their judgments and take account of any developments there may have been since the damage was inflicted.[4] And although it is true that, if the shooting had happened shortly after the trial, the plaintiff would have got his damages in full and nothing could have altered them, this is no argument for ignoring events that have already happened but merely shows up a limitation of a system which makes a final lump sum award mandatory and allows neither awards by way of periodical payments nor subsequent revision of awards in the light of changed circumstances after judgment. The difficult question, however, comes when it is asked whether the shooting affects the extent of the defendant's liability and the measure of damages which the plaintiff may claim from him. For the defendant had contended that he was liable only for the loss sustained by the plaintiff up to the time of the shooting, because the plaintiff's present state of disablement was caused wholly by the shooting which submerged and obliterated the consequences of the initial injury. This contention was rejected by Donaldson J. at first instance,[5] accepted by the Court of Appeal,[6] and again rejected by the House of Lords.[7]

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[1] [1970] 2 W.L.R. 50; [1969] 3 All E.R. 1528 (H.L.).

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[2] *Corey* v. *Havener*, 182 Mass. 250, 65 N.E. 69 (1902) provides a leading illustration of this. Two motorcyclists simultaneously pass the plaintiff's horse, the horse bolts and the plaintiff is injured; either motorcyclist on his own would have caused this result.

[3] The plaintiff was guilty of contributory negligence which consequently gave rise to an apportionment issue, but this aspect of the case is not relevant here.

[4] Death (*Williams* v. *Thorneycroft* [1940] 2 K.B. 658 (C.A.)) and remarriage (*Curwen* v. *James* [1963] 1 W.L.R. 748 (C.A.)) are perhaps the most telling examples.

[5] [1969] 1 Q.B. 38.

[6] [1969] 2 W.L.R. 489 (C.A.).

[7] [1970] 2 W.L.R. 50 (H.L.).

To adopt the defendant's argument poses a causal dilemma for the victim of personal injuries arising from two successive and independent torts wherever the second tort would have sufficed to cause the damage inflicted by the first tort. For instance, a person might suffer a 60 per cent. loss of earning capacity as a result of a tortious injury, and then, by a further tortious injury capable of producing total incapacity, be deprived of all earning power. The first tortfeasor is exonerated because the injury caused by him has been submerged in and obliterated by the later injury; the second tortfeasor can rely on the familiar principle that he is entitled to take his victim as he finds him, thereby limiting his liability to pay damages to 40 per cent. loss of earning capacity. Indeed, circumstances can arise where the victim would, on this analysis, obtain no damages at all for loss of earning capacity, whether partial or total. This would be so if the first tort rendered a leg completely useless and the second required its amputation and replacement by an artificial leg, but without producing any further diminution in the victim's capacity to earn. This analysis leads to the result that the victim who sustains injuries by reason of two successive and independent torts finds himself in a worse situation than the victim who sustains the same injuries at the hands of a single tortfeasor. Such a result is one which the law can hardly regard as acceptable.

There are two ways in which the law can rescue the plaintiff from this causal dilemma: either it continues to hold the first tortfeasor liable for the loss arising from the initial injury notwithstanding the second tort, while holding the second tortfeasor liable for any additional injury which he has inflicted; or it places the total liability upon the second tortfeasor. The first solution, however, runs directly counter to the requirement that the defendant's act must be a *causa sine qua non* of the plaintiff's injury, and is acceptable only if that requirement receives some modification. Accordingly the House of Lords advanced, and relied upon, the proposition that the first tortfeasor does not have his liability reduced if, as Lord Reid put it, " the later injuries merely become a concurrent cause of the disabilities caused by the injury inflicted by the defendant "[8]; in other words, the defendant will be held to have caused the damage if his participation would have been necessary to bring it about in the absence of other factors sufficient to do so.[9]

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[8] *Ibid.* at p. 57. Lord Reid's speech was concurred in by Viscount Dilhorne, Lord Donovan and Lord Guest; only Lord Pearson delivered a separate speech.

[9] Adoption of the first solution does not, however, require the retention of liability upon the first actor where the initial tortious injury gives rise to the need for an operation at such time in the future as the victim may choose and the later tortious injury forces him immediately into hospital for the identical operation. In these circumstances the first tortfeasor should escape liability for both the loss of earning capacity and the medical expenses attributable to the operation because the victim at the time of the second tort was neither incapable of continuing to earn nor obliged to incur medical expenses, and a series of decisions involving damage to ships (analysed in Mayne and McGregor, *Law of Damages* (12th ed. 1961), at §§ 663–667) can be applied

On the other hand, the second solution is causally unimpeachable, the argument for it running thus: where the initial incapacity has been caused by an earlier tort for which the victim is now precluded from claiming damages, the second tortfeasor is to be regarded as having caused not only the further injury but also the loss of the action against the first tortfeasor, a conclusion which is fully consistent with the principle that a tortfeasor takes his victim as he finds him. But this solution has to contend with a difficulty coming from a different direction: the law, while fully accepting the causal connection, may yet, as a matter of policy, regard the plaintiff's loss of his potential damages claim as too remote a consequence of the second tortfeasor's conduct, rather as in *Liesbosch Dredger* v. *S.S. Edison*[10] the plaintiff's loss attributable to his impecuniosity was regarded as too remote. This indeed was the view of Lord Pearson,[11] but not that of the Court of Appeal.[12]

Even though it may seem that the technically simpler course would have been to have surmounted the remoteness difficulties surrounding the second solution than the causal difficulties presented by the first, the House of Lords was right to prefer the first solution over the second since of the two it is the fairer both for the tortfeasors and for the victim.[13] As for the tortfeasors, it is surely more consistent with equity to hold each liable for the loss which he himself has inflicted—the first for the initial loss and the second for the additional loss—than to place the total liability upon the second tortfeasor. As for the victim, he is afforded a larger measure of protection if the first tortfeasor's liability is retained. For if the whole burden is placed upon the second tortfeasor and he is a man of straw—as would appear to have been the position in *Baker* v. *Willoughby* itself—or cannot be traced, then the victim is left without any redress; this point was indeed made by Lord Pearson.[14]

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by analogy to endorse this reasoning and this result (the process of application in this way is undertaken in Street, *Principles of the Law of Damages* (1962) at pp. 175–177). But this category of case is clearly a very limited one, and Lord Reid rightly did not find the shipping cases of real value in solving the *Baker* v. *Willoughby* problem: see [1970] 2 W.L.R. 50, 56–57.

[10] [1933] A.C. 449 (H.L.).

[11] [1970] 2 W.L.R. 50, 59.

[12] [1969] 2 W.L.R. 489, 495, 496 and 498, *per* Widgery L.J., Fenton Atkinson L.J. and Harman L.J. respectively. One situation in which the victim should be permitted to claim for his entire loss against the participant second in time is when the latter's act prevents the conduct of the participant first in time from being translated into actual injury and therefore from maturing into a tort, *e.g.* a boy, falling to almost certain death on the rocks below from a bridge negligently maintained by the highway authority, is instantly killed when, in an attempt to save himself, he grasps at a live cable negligently positioned over the bridge by the electricity authority. This illustration is based upon *Dillon* v. *Twin State Gas and Electric Co.*, 85 N.H. 449, 163 A. 111 (1932), where however no one was responsible for the boy's loss of balance so that the prospective injury had no tortious quality. The implications of this celebrated American case are fully dealt with by Strachan, *infra*, at pp. 392, 394.

[13] The first solution has also been adopted in Canada: *Stone* v. *Evans* (1958) 14 D.L.R. (2d) 78 (Alberta Supreme Ct., App. Div.); *Long* v. *Thiessen and Laliberte* (1968) 65 W.W.R. 577 (British Columbia C.A.).

[14] [1970] 2 W.L.R. 50, 59.

Furthermore, if the victim's own negligence has contributed to the second, but not the first, injury he has suffered, a victim who had himself been at fault in relation to the second injury but not to the first would find, if he were required to claim for his total loss from the second tortfeasor, that his contributory negligence in the second accident would go also to reduce his damages in respect of the injury suffered in the first.

We have assumed so far that both injuries have been inflicted tortiously. What, however, if one or other is caused innocently, by non-tortious accident or natural disease? What results will follow from an application to this type of situation of the causal principles implicit in the alternative solutions for successive torts? Let it be assumed, once again, that an initial injury brings in its train a 60 per cent. loss of earning capacity and that a further injury, itself capable of producing a total loss of earning capacity, removes the remaining 40 per cent. In these circumstances, if it is the further injury which is inflicted by tort, then the result will be identical under either solution: the tortfeasor will be liable only for a 40 per cent. loss. But if it is the initial injury which is the tortious one, the result will differ as between the two solutions; under the second solution the tortfeasor will clearly not be liable at all, while under the first solution he will remain liable for 60 per cent. since, in purely causal terms, it can make no difference to a tortfeasor's liability whether or not a subsequent injury which would by itself have produced the total loss is or is not tortious. Moreover, by its reliance upon *Harwood* v. *Wyken Colliery Co.*,[15] the House of Lords appears to accept that this would be the proper result. In that case an accident had made an employee, who was claiming workmen's compensation, fit only for light work, and then a heart disease had supervened which also caused him to be fit only for light work. The argument for the employer, which was the same as that for the defendant in *Baker* v. *Willoughby*, was rejected, and Hamilton L.J., in a passage cited with approval by Lord Reid, said that he regarded the employee's entitlement to compensation as unaffected by the heart disease because it could not be said that his "partial incapacity for work has not resulted and is not still resulting from the injury." [16]

And yet it may be questioned whether the victim of a tort whose injury is swallowed up in a supervening heart disease or other non-tortious illness or injury should be entitled to claim damages for the loss arising subsequently to the time that he is overcome by the later affliction. Why should the defendant pay if the plaintiff would in any event have fallen ill or been incapacitated? It is one thing to protect the victims of multiple torts from falling between two stools; it is quite another to afford protection from non-tortious loss while our legal system continues to adhere to the principle that adequate compensation for injury and disease should be available only to those whose injury or disease has been tortiously inflicted. Indeed, in the Court of Appeal counsel for the plaintiff had conceded that, had the subsequent pre-trial disability been caused by a non-tortious agency, " damages for future incapacity would properly be reduced and might in some cases have to be reduced to nil." [17] The point is clearly still an open one; counsel's concession in the Court of Appeal can still be adopted in the context of the House of Lords decision in *Baker* v. *Willoughby* by an analysis along these lines: while the defendant will be taken to have caused damage if his participation would have been necessary to bring it about in the absence of another factor sufficient to do so, liability for such damage will, on policy grounds, be considered too remote where that other factor is itself non-tortious.[18]

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[15] [1913] 2 K.B. 158 (C.A.).

[16] *Ibid.* at p. 169; for Lord Reid's reliance on the decision, see [1970] 2 W.L.R. 50, 55–56.

It does not, however, follow from the decision in *Baker* v. *Willoughby* that the extent of the first tortfeasor's liability will always be unaffected by the second tort and will never be cut down as a result of it. This is true only where the second tort increases the victim's loss—or, alternatively, leaves it static; if, on the other hand, the second tort cuts down the victim's loss, it will also operate to cut down the extent of the first tortfeasor's liability. This distinction is fully recognised by the House of Lords. Lord Reid contrasted the later injury which merely becomes a concurrent cause of the disabilities inflicted by the initial injury and the later injury which actually reduces those disabilities, and accepted that, while in the former situation the tortfeasor inflicting the initial injury cannot claim any diminution in the damages payable by him, in the latter situation he clearly can.[19] For it does not follow that a greater injury necessarily produces a greater loss. The later tort may, somewhat ironically, aggravate the injury while at the same time ameliorating the loss, and to the extent that the victim's position is thereby ameliorated, the tortfeasor responsible for the initial injury obtains the advantage of the amelioration. Thus if the initial injury to the victim's leg leaves him in constant pain but the pain totally disappears after the leg's amputation following the second injury, there can no longer be any liability upon the first tortfeasor in respect of future pain which his victim will now not incur. This result was indeed accepted by their Lordships, but the amount awarded for pain subsequent to the date of the amputation was considered too negligible a part of the global award of £1,600 to require any downward readjustment of that figure.[20] Similarly, one can conceive of an increase in injury resulting in a decrease in medical expenses: this would be so where the amputation of the victim's leg as a result of the later injury altogether removed the need for the frequent medical attention which had formerly been required by reason of the chronic osteomyelitis engendered by the initial leg injury.

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[17] [1969] 2 W.L.R. 489, 496.

[18] *Cf.* however, in the context of concurrent causes, *Anderson* v. *Minneapolis, St. Paul and S.S.M. Ry. Co.*, 146 Minn. 430, 179 N.W. 45 (1920) repudiating on identical facts—two fires, one originating naturally and the other due to the defendant's negligence—*Cook* v. *Minneapolis, St. Paul and S.S.M. Ry. Co.*, 98 Wis. 624, 74 N.W. 561 (1898) in which the defendant was held not liable.

[19] [1970] 2 W.L.R. 50, 57.

This important distinction between aggravation and amelioration of loss provides the key to the explanation of why the death of the victim of a tort between injury and trial leads to a diminution of his damages, entitling his estate to recovery only for the pecuniary and non-pecuniary loss incurred by him up to the date of his death; it also shows that Donaldson J.'s concern at first instance over the anomaly of such a result [21] was misconceived, for there is in truth no anomaly. Death is but another illustration of amelioration of loss, and therefore, as the House of Lords recognised, the defendant is liable for less damages not only where the later tort reduced the plaintiff's disabilities but also where it "shortens the period during which they will be suffered by the plaintiff." [22]

However, this analysis, while perfectly valid in relation to the deceased victim himself, ignores the position of his dependants. As far as they are concerned, the death of their breadwinner increases rather than reduces their loss; after the tortious injury they were left with a breadwinner whose earning capacity had been diminished by, say, 60 per cent., while now they are left with no breadwinner at all. Accordingly, as far as the dependants are concerned, the death, if itself caused tortiously by another tortfeasor, produces a position which precisely follows the lines of that in *Baker* v. *Willoughby* itself. An application of the principles of that decision would then require that the tortfeasor causing the injury should be liable for 60 per cent. of the dependants' loss of support and the tortfeasor causing the death for the remaining 40 per cent. But the dependants' action against both tortfeasors must depend upon the provisions of the Fatal Accidents Acts, and it is questionable whether the wording of section 1 of the basic statute of 1846 [23]—commonly called Lord Campbell's Act—will stretch to permitting any claim to the dependants against the first tortfeasor, although their claim against the second for a 40 per cent. loss of support presents no problem. The section runs:

> "Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party

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[20] *Ibid.* at p. 58.

[21] [1969] 1 Q.B. 38, 44–45.

[22] [1970] 2 W.L.R. 50, 57, *per* Lord Reid; similarly at p. 59, *per* Lord Pearson.

[23] 9 & 10 Vict. c. 93.

> injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

This provision would appear to impose a liability only upon the person causing the death—certainly one may fairly safely assume that this was all that was contemplated by the draftsman at the time—so that the dependants would have no recourse against the person causing the initial injury. If this be so, the dependants can be fully protected only by making the person who causes the death liable to compensate them for their total loss of support, a result which would have been acceptable to the Court of Appeal in *Baker* v. *Willoughby* but which is now effectively precluded by that court's reversal in the House of Lords. With this avenue barred, there is left the possibility of attempting a construction, even if a strained construction, of the section which would bring the person causing the injury as well as the person causing the death within the ambit of liability. In this, one could normally start by relying upon section 1 of the Interpretation Act 1889 [24] which allows the use in statutes of words in the singular to be construed as including the plural, so that the vital phrase in the section could be read as "the persons who would have been liable for damages if death had not ensued shall be liable to actions for damages"; here, however, an unexpected difficulty is encountered in that section 1 of the Interpretation Act in its terms applies only to statutes enacted after 1850.[25] Nevertheless such a construction is necessary and clearly proper in order to fix liability upon two or more persons whose concurrent negligence has caused a death, and it may perhaps be argued that it is equally proper in order to bring in a person who, though in no way responsible for the death, nevertheless satisfies the definition of a "person who would have been liable for damages if death had not ensued." [26] What, however, is beyond a doubt is that there is no conceivable construction of the wording of section 1 of Lord Campbell's Act which would allow the dependants to found a claim against the tortfeasor causing their breadwinner's 60 per cent. loss of capacity if his subsequent death were attributable to an innocent rather than a tortious cause. This may well be a wise result; but it would hardly be consistent with the House of Lords' apparent endorsement of the proposition that a personal injury victim may still sue in respect of an injury which has been submerged in a subsequent non-tortious one.

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[24] 52 & 53 Vict. c. 63.

[25] Apparently on the assumption that Lord Brougham's Act of that date (13 & 14 Vict. c. 21), s. 4 of which it was replacing, itself only applied to then future statutes. This is supported by the marginal title to s. 4 but not by the terms of the section itself.

[26] It may also be said that an action by the dependants after one by the victim is precluded by the provision of s. 3 that "not more than one action shall lie for and in respect of the same subject-matter of complaint." However, it is clear that the purpose of this provision is to prevent a multitude of separate actions by a multitude of separate dependants.

HARVEY MCGREGOR.*

THE SCOPE AND APPLICATION OF THE "BUT FOR" CAUSAL TEST

THE causal aspect of tortious liability raises a number of issues of considerably wider scope than those considered in *Baker* v. *Willoughby*. There are, of course, two distinct causal problems. The first is concerned with whether there is a causal relationship between the defendant's conduct and the plaintiff's injury. Was the defendant's action, in point of fact, that is, in "scientific" terms, necessary for the production of the plaintiff's injury? Or would that injury have occurred irrespective of the defendant's action? If the first of these questions is answered affirmatively the second inquiry arises as to whether the injury incurred was sufficiently proximate to the defendant's negligent action for liability to be imposed. The first question therefore is basically one which is divorced from matters of legal policy and turns on a question of "pure" causation, while the second is intimately concerned with policy considerations of where and to what extent liability should lie. The distinction broadly corresponds to what Hart and Honoré have called [1] the "explanatory" context (the explanation in causal terms of the various factors which have combined to produce a result) and the "attributive" inquiry (the lawyer's task of determining whether the harm produced can properly be said to be attributable to the defendant's conduct). American legal terminology expresses this "bifurcation of causal questions" [2] as a distinction between causation-in-fact and causation-in-law. We are concerned here only with the causation-in-fact inquiry, the way in which the inquiry is conducted and the problems that are raised.

In order to determine whether the defendant's conduct may be deemed to have been a cause of the plaintiff's injury the test normally applied is the "but for" test, which concerns itself with whether such conduct was a *sine qua non* of the ultimate injury. According to this test the defendant's action is a cause of the plaintiff's injury only if such injury would not have occurred *but for* the conduct of the defendant. In other words, if the injury for which the defendant is alleged to be liable would have occurred irrespective of the defendant's act or omission, then such act or omission cannot be said to have been its cause. A night-watchman presented himself at the casualty department of the hospital run by the defendants with complaints of vomiting for a considerable period after drinking tea, and was told by the medical casualty officer to go home to bed and call his own doctor.[3] About five hours later he died from poisoning by arsenic which had been introduced into the tea. In an action brought by the deceased's widow claiming that the death resulted from the casualty officer's negligence in not diagnosing or treating his condition, it was held that the defendants were not liable in spite of the fact that they owed the deceased a duty of skill and care and that the casualty officer was negligent in not seeing and examining the deceased. For the plaintiff had failed to show on the balance of probabilities that the death would not have occurred even if the deceased had been admitted to the wards five hours before his death and treated with all care.

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[1] Hart and Honoré, *Causation in the Law*, pp. 22–23.

[2] *Ibid.* at p. 104.

The same problem arises with an additional complication where injury would have occurred irrespective of the defendant's omission, but such injury would have been reduced if the defendant had acted in accordance with his duty. In *Nitro-Phosphate Co.* v. *London & St. Katharine Docks*[4] the defendant dock company was bound by statute to maintain a dock and an artificial channel joining the dock to the Thames, by the erection of a protective bank to the height of four feet two inches above high-water mark. At one point the retaining bank was several inches below this height. An exceptionally high tide overflowed the walls bordering this channel and flooded neighbouring land owned by the plaintiff. James L.J., delivering the judgment of the Court of Appeal, stated that the defendants were in breach of their statutory duty in not keeping the wall at a height of four feet two inches but intimated that as the tide was four feet five inches above high-water mark and therefore above the height at which the defendant company was bound to maintain the bank, not all the damage was to be attributed to their negligence:

> "No doubt, if the court can see on the whole evidence that there was a substantial and ascertainable portion of the damage fairly to be attributed solely to the excess of tide above the proper height which it was the duty of the defendants to maintain, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper reduction in that respect."[5]

In such cases a proportionate reduction of damages, if possible to ascertain, is obviously consistent with the basis on which liability is imposed.

This inquiry is, in a sense, a purely factual one, seeking as it does to eliminate from the mass of actions which antedate an injury those which fall outside the causal chain leading to the injury.

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[3] *Barnet* v. *Chelsea & Kensington Hospital Management Committee* [1968] 2 W.L.R. 422.

[4] (1878) 9 Ch.D. 503.

[5] At p. 527.

Looked at in this way, policy considerations would appear to be inoperative since "no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed."[6] But as this question is determined by a forensic inquiry based on evidence the inevitable scope afforded to the judge may be used to effect a policy decision. The insinuation of policy factors was exemplified in a rule relating to the burden of proof in cases of an employer's breach of his statutory duty. In *Vyner* v. *Waldenberg Bros. Ltd.*[7] Scott L.J., delivering the judgment of the Court of Appeal, stated in terms:

> "If there is a definite breach of a safety provision imposed on the occupier of a factory, and a workman is injured in a way which could result from the breach the onus of proof shifts onto the employer to show that the breach was not the cause."

This doctrine obtained for ten years[8] before it was exploded by a unanimous House of Lords in *Bonnington Castings* v. *Wardlaw*,[9] when it was reasserted that the plaintiff has the burden of proof on the balance of probabilities that compliance with the statutory duty would have averted the injury. So when an experienced steel erector falls seventy feet to his death, his widow's action does not succeed if she fails to show on the balance of probabilities that he would have worn a safety belt if his employers had provided one.[10] But the plaintiff's burden may be alleviated, even within the normal framework of distribution of burdens of proof, by the operation of a presumption in his favour arising from the nature of the breach of duty seen in relation to the injury sustained. A workman employed in demolishing buildings and boilers subsequently suffered intermittently from dermatitis for several years; his employers had been in breach of duty in not providing washing facilities. The House of Lords (Sc.D.) held that as he had not previously suffered from the disease and contracted it only after being subjected to conditions likely to cause it, and as it had started in a way typical of the disease when caused by such conditions (on the back of the hand), the plaintiff had established a prima facie presumption that his disease was caused by those conditions. This the employers had failed to displace.[11]

But, in principle, no presumption exists in favour of the plaintiff, who has the burden of proof in this hypothetical investigation as he does in every other part of his case. In practice it is reasonable to believe that insufficiency of evidence as to how the plaintiff would have reacted in a hypothetical situation may result in a policy decision, when the court is presented with the choice of deciding between an injured plaintiff and a defendant who is shown to have been in breach of a duty. An American writer,[12] in the tradition of the American Realist school of lawyers, has forcefully asserted that the causation-in-fact inquiry, like the causation-in-law inquiry, is intimately concerned with considerations of policy, the difference between them being one of degree rather than one of kind. According to this writer the use of the apparently scientific " but for " test in the causation-in-fact inquiry constitutes " an attempt to poise the inquiry on a wholly abstract plane, stripped of all evaluative overtones "[13] and serves to " lend some sense of definiteness and finality to the process."[14]

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[6] Fleming, *The Law of Torts* (3rd ed., 1965) p. 176.

[7] [1946] K.B. 50.

[8] In *Roberts* v. *Dorman Long & Co. Ltd.* [1953] 1 W.L.R. 942, 946, Lord Goddard in the Court of Appeal went further still, maintaining that where there was a duty to provide safety belts and none was provided it was not open to the defendants to contend that even if they had been provided they would not have been worn.

[9] [1956] A.C. 613.

[10] *McWilliams* v. *Sir W. Arrol & Co.* [1962] 1 W.L.R. 295.

[11] *Gardiner* v. *Motherwell Machinery & Scrap Co. Ltd.* [1961] 1 W.L.R. 1424.

The view has more recently been advanced in America[15] that such policy decisions as are involved in the application of the " but for " test be squarely faced by considering the effect of the defendant's negligence under the heading of " duty," *i.e.* the question what would have happened hypothetically in the absence of the negligent aspect of the defendant's conduct should be handled by the judge in considering what duty, if any, the defendant owed the plaintiff under all the circumstances of the case. This thesis has been precipitated by the decision of the Supreme Court of Texas in *Texas & Pac. Ry.* v. *McCleery*.[16] McCleery was a passenger in a truck that collided with the defendant's freight train one night in Dallas. The train was travelling at a speed of 25 miles per hour, which violated the legal speed limit of the city of 12 miles per hour. The Supreme Court of Texas found in favour of the defendant on the ground that the plaintiff had failed to adduce evidence that he would not have suffered the same injuries if the train had been travelling within the speed limit, *i.e.* he had not shown that the injuries sustained had been caused by the excessive speed of the train. Professor Thode has condemned the technique used by the court, rather than the actual decision, on the basis that the " use of the hypothetical case and ' but for ' tests conceals policy decisions that should openly and knowingly be made by the trial judge."[17] On his analysis the question for the trial court was whether a person in McCleery's position is entitled to the law's protection. It would therefore be open to the court to find either that a duty not to create an unreasonable risk was owed only to those who probably would have avoided injury if the train had been travelling at a legal speed, or that risks created by speeding trains created such dangers to users of the highway that the railroad's duty extended to a truck passenger who would have suffered injury even if the train were moving at a proper speed.

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[12] Wex Malone, "Ruminations on Cause-in-Fact," 9 *Stanford Law Review* 60 (1956–57).

[13] *Ibid.* at p. 66.

[14] *Ibid.* at p. 65.

[15] Thode, "The Indefensible Use of the Hypothetical Case to Determine Cause in Fact," 46 Texas L.Rev. 423 (1968); this article elicited a defence from Henderson, "A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—The Need for an Expanded, Rather than a Contracted, Analysis," 47 Texas L.Rev. 183 (1969); and Thode replied to this defence in "A Reply to the Defense of the Use of the Hypothetical Case to Resolve the Causation Issue," 47 Texas L.Rev. 1344 (1969).

[16] 418 S.W. 2d 494 (Tex. 1967).

[17] Thode (1969) 47 Texas L.Rev. at p. 1345.

One of the arguments in support of this analysis is that it effects a necessary re-allocation of functions between judge and jury, the nature of the defendant's duty being a question for the judge rather than the jury, who are incapable of considering all the factors that should influence the decision. This argument obviously will not apply in jurisdictions where such cases are tried by a judge sitting alone. It is urged further that the " but for " test places a very heavy burden on the plaintiff, in that he has to establish the negative in the hypothetical situation. It is true that the plaintiff does have an onerous burden, and it was to act as a palliative to this that the rule in *Vyner* v. *Waldenberg Bros.* was adopted. Whereas the present writer is not sure that the burden should not shift under certain conditions and in certain contexts (*e.g.* on proof of breach of duty and injury to the plaintiff in factory accident cases), there would appear to be little justification in every case of what may be no more than the coincidence of a breach of duty and injury to the plaintiff for a general alleviation of the plaintiff's duty to show that it was the defendant's negligence that caused his injury.

But the main argument advanced in support of the " duty analysis " is the fact that it overtly treats under a policy head a question in which legal policy is intimately involved. While this approach may yield a result that is substantially the same in cases in which it is virtually impossible to resolve the hypothetical case on the basis of the evidence (*i.e.* in certain borderline cases it is conceded that policy considerations operate), in those cases where the evidence clearly supports either the plaintiff's or the defendant's causal arguments, the duty analysis would either leave the case open to arbitrary decision in a situation which is essentially factual or, and this is more likely, it would oblige the court to articulate a concocted notion of the duty owed by the defendant in order to give effect to the obvious demands of justice in the case. This last point may be simply illustrated. In one case A works in a factory in which his employer is statutorily bound to provide protective asbestos spats to guard against injury from molten metal. A has often boasted to his workmates that he has never worn spats and never intends to. No one else in the factory wears spats. A is injured by molten metal as a result of his not wearing spats; these the employer has failed to provide. In another case B works in a similar factory and has often complained that no spats are available for him, although everyone else wears spats, and has expressed his desire to wear them to protect himself. B is similarly injured; again the employer has not provided spats. It is submitted that the court must irresistibly come to the conclusion that the employer's breach of duty was not the cause of A's accident but was the cause of B's. And this conclusion is arrived at on causal grounds by application of the " but for " test, whether the court so expresses itself or not. It would certainly be more specious to dress these decisions up in terms of the extent of the duty owed by the employers to provide spats for their respective employees (which duty would have to be said to be owed by B's employer to B but not by A's employer to A) than it is at present to assert that borderline causal issues are being decided on purely causal grounds. The side-effects of the remedy would appear to be more harmful than the disease to be cured.

The " but for " test, though attractive and serviceable because of its basic simplicity, is incapable of dealing with all questions of factual causation. In certain situations common sense demands that a person be held responsible for a certain injury although that injury would have occurred without his participation. It is in situations where there are two independent factors, each being sufficient to produce the injury, that the test proves unsatisfactory. Such factors may operate either concurrently or successively. They operate concurrently if two independent fires, both negligently started, converge on a house and demolish it. Short shrift should be given to the contention that the damage is not caused by one, since another set of circumstances existed which would have caused the damage independently.[18] The logical conclusion, if such a contention were to succeed, would be that the house-owner would be left with no redress since neither fire could be said to have caused the loss. The common-sense solution has received judicial confirmation in a number of cases concerning river pollution, when it has been held that the defendant is liable although he has been one among many who together have fouled a stream.[19]

The problem becomes more convoluted when the independent factors, each of which is sufficient to produce the injury, are successive rather than concurrent. In the first place we shall consider the position of the second actor who is a tortfeasor. The situation then is that there exists a set of conditions, brought about by tortious or non-tortious acts giving rise to actual or prospective damage, and this set of conditions is followed by a tortious act effecting the damage threatened or caused. The variables are therefore the tortious or non-tortious nature of the first set of circumstances and the actual or prospective harm which these circumstances occasion. First, we may consider a non-tortious situation threatening prospective damage followed by a tortious act which in fact causes that damage, *e.g.* the classic example of the house which is in fact destroyed by a fire negligently started but which would in any event have been destroyed by a flood already moving towards the area. The American approach to this situation is exemplified in *Dillon* v. *Twin State Gas Co.*,[20] in which a boy lost his balance while leaning over a bridge but to stop himself from falling grabbed hold of the defendant's wires. These wires, being charged with high-voltage current, electrocuted him before he fell to what would have been almost certain death on the rocks below. Liability was imposed on the defendant. There is some judicial authority for the view that English courts would arrive at the same conclusion. In *Smith* v. *Cawdle Fen Commissioners*[21] du Parcq J. said, *obiter*:

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[18] For the case where one fire is caused by the defendant's negligence but the other has an unknown cause, see McGregor, *supra*, p. 888, note 18 and text accompanying that note.

[19] *e.g. Crossley* v. *Lightowler* (1867) 2 Ch.App. 478; *Pride of Derby* v. *British Celanese* [1952] 1 All E.R. 1326.

> " If you destroy something on one day, you are liable to pay damages, even though somebody else might have intended to destroy it, and it might certainly have been destroyed, a few days afterwards."

The measure of damages in the cases given above is determined on the analogy of a second category of cases which is substantially the same but which differs in that the initial situation is non-tortious *or* tortious and causes actual injury rather than prospective injury. In such cases, although liability is imposed, damages are assessed on the basis of the loss the second act alone has caused. So in the case of a druggist who supplied tartar emetic instead of bismuth for an attack of 'flu to a fatally sick patient, damages were reduced to nil on the basis that the tartar emetic had not accelerated to any appreciable extent an already imminent death.[22] And again, where the plaintiff's car is involved successively in two collisions, both necessitating a respray of the lower part of the bodywork, the plaintiff cannot recover from the second of the negligent parties since he has not caused any extra loss in respect of the already damaged car.[23] In the same way that such cases are resolved on the basis that the second party's liability should be limited to the loss he has actually occasioned, so in the first category of cases (involving prospective loss) the defendant's liability is limited to that for a house-about-to-be-flooded or a boy-about-to-be-killed. So in *Dillon* v. *Twin State Gas Co.* the court's award to the plaintiff was to the value of his limited life expectancy at the time of hitting the wires—" the defendant deprived him, not of a life of normal expectancy, but of one too short to be given pecuniary allowance."[24] The same contention has again been supported in England—

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[20] (N.H. 1932) 163 Atl. 111. See Fleming, *Law of Torts* (3rd ed., 1965), at pp. 180–181.

[21] [1938] 4 All E.R. 64.

[22] *Kerry* v. *England* [1898] A.C. 742.

[23] *Performance Cars* v. *Abraham* [1962] 1 Q.B. 33.

[24] *Per* Allen J. at pp. 114–115.

> "If a man is killed by somebody's negligence on a Monday, and it is proved to the satisfaction of a jury that he had been sentenced to death and would have been hanged on a Wednesday, I think it is absurd to suppose that his executors would recover the same damages as if he had been a person with a likelihood of long life."[25]

In a third category of situations there is a tortious situation threatening prospective damage followed by a tortious action which in fact causes that damage, *e.g.* the flood in the example given above is caused by the negligent maintenance of a dam, or, in *Dillon* v. *Twin State Gas Co.* the boy is knocked off the bridge by a negligent motorist. In this situation the view has been variously advanced[26] that the second tortfeasor is fully liable since the evaluation of the person or property harmed would include a potential cause of action against the negligent dam-keeper or the negligent motorist.[27] And this is obviously consonant with the liability imposed on the second actor in each of the situations outlined—he is liable for the loss *he* has caused (*i.e.* for the additional loss incurred as a result of his action[28]) whether it be the death of a person falling to certain death, or death to a person already fatally sick. In our third category of cases the second actor killed "a boy with a potential right of action against a motorist" or burnt "a house in respect of which existed a potential right of action against a dam-keeper."

Seen in this light the imposition of liability on the second actor, the tortfeasor, in each of the situations outlined does not contravene the "but for" test if carefully defined:

1. In the first category of cases the defendant has a limited liability for destroying a house threatened by a flood or for killing a boy facing imminent death, which accelerated destruction or accelerated death would not have occurred but for the defendant's act.
2. Again, in the second category of cases the defendant has a limited liability for *e.g.* accelerating the death of a fatally sick patient, which acceleration would not have occurred but for the defendant's act.

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[25] *Per* du Parcq J. in *Smith* v. *Cawdle Fen Commrs.* (*supra*) at p. 71.

[26] *e.g.*, Fleming, *The Law of Torts*, p. 181; Peaslee "Multiple Causation and Damage," 1187–1188 47 Harvard Law Rev.; Henderson, 47 Texas L.Rev. 183 (1969), 208; Thode, 47 Texas L.Rev. 1344 (1969), 1356–1357.

[27] This right of action may be too remote. In *Baker* v. *Willoughby* Lord Pearson doubted whether diminution of damages recoverable from the first tortfeasor would be an admissible head of damage in an action against the second tortfeasor—"it looks too remote"—and pointed out that this would not assist the victim if the second tortfeasor could not be traced or was a man-of-straw and uninsured. But policy considerations may demand the contrary solution in the situation considered above where the first actor has caused prospective and not actual loss so that no action can lie against him; see McGregor, *supra*, p. 881, note 12.

[28] In *Baker* v. *Willoughby* [1969] 3 All E.R. 1528, Lord Reid said, at p. 1533, "The second [wrongdoer] is not liable for any damage caused by the first wrongdoer but must pay for any additional damage caused by him." The same proposition finds support in Lord Pearson's analysis at pp. 1535–1536.

3. In the third category of cases the defendant is liable for the death of a boy with a potential action against the first tortfeasor and the death of this boy-with-a-potential-right-of-action would not have occurred but for the defendant's act.

These conclusions we have come to are simply part of the larger proposition mentioned by Lord Reid in *Baker* v. *Willoughby*,[29] that the wrongdoer must take the plaintiff (or his property) as he finds him; that may be to his advantage or disadvantage.

Hitherto we have been considering successive independent factors, each sufficient to produce the damage, from the position of the second actor. We have concluded that the limitation of his liability to the additional injury he has caused is perfectly in keeping with the "but for" test. It now falls for us to consider the situation where the first actor is the tortfeasor. Here the only variable involved is the tortious or non-tortious nature of the ensuing set of conditions which are sufficient to produce the damage already inflicted. Where the perpetrator of the first act is a tortfeasor, what is the extent of his liability? In *Harwood* v. *Wyken Colliery Co.*[30] an injury in the defendant's coal mine rendered the plaintiff fit only for light work and this was followed by a heart disease which in any event would have prevented him from undertaking anything other than light work. It was held that the accident continued to be a partial cause of the injury. The same approach was adopted by the House of Lords in *Baker* v. *Willoughby*,[31] where the second act was of tortious rather than non-tortious origin. Lord Reid espoused the view that it was quite possible for an event to have two causes, maintaining that the plaintiff's disability was caused by the road accident *and* by the shooting—"if the later injuries merely become a concurrent cause of the disabilities caused by the injury inflicted by the defendant, then in my view they cannot diminish the damages."[32]

It is submitted that in strict causal terms the argument of the defendant is a strong one—the subsequent amputation of the leg would indeed appear to have submerged the original stiffness to the leg and ankle. It is difficult to see how a man who loses one finger and subsequently loses his arm in a circular saw accident can be said to be suffering from the loss of the finger after the second accident has occurred. But, as Lord Pearson pointed out, the argument cannot succeed because of the manifest injustice it produces. We have seen from the earlier analysis the extent of the liability of the tortfeasor when he either commits a second tort or acts in the context of a previous non-tortious but injurious situation—he is liable only for the additional loss he causes. As

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[29] *Baker* v. *Willoughby* [1969] 3 All E.R. 1523, 1533.

[30] [1913] 2 K.B. 158. See McGregor, *supra*, p. 332.

[31] [1969] 3 All E.R. 1523.

[32] *Ibid.* at p. 1534.

McGregor has shown earlier[33] if the defendant's argument in *Baker* v. *Willoughby* were allowed to succeed, the victim of two successive tortfeasors might be in a worse position than the victim of one. The decision of the House of Lords is therefore demanded in practice, justifiable in theory and fully accords with the liability of the second tortfeasor.

The imposition of full liability on the first tortfeasor exposes the limitations of the " but for " test. Whereas the robber is exonerated if he has not caused any additional loss, the motorist is liable although the loss subsequent to the shooting would have occurred irrespective of his negligence. It is particularly in this context of the liability of the first tortfeasor in the case of successive torts that the inadequacies of the " but for " test are revealed—the strictly causal test falls to the obvious demands of justice. As has been said in a different context, logic does not always have the last word in law and when it leads to morally unjustifiable results, moral considerations have prevailed.

D. M. A. STRACHAN.*

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[33] *Supra*, p. 390.

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SOME SOCIOLOGICAL ASPECTS OF STRICT LIABILITY AND THE ENFORCEMENT OF FACTORY LEGISLATION

> "He did not understand the noble Lord [Althorpe] to object to machinery being properly boxed and guarded . . . but to the impropriety of attaching such a punishment as that of manslaughter for such comparatively small offences as an accident from machinery, where, in fact, the proprietor of the mill might not be to blame at all. . . . in their wish to carry into effect benevolent designs, they had overlooked the magnitude of the consequences—an error not very unusual with all righters of wrongs and redressers of grievances from the days of Don Quixote to those of the noble Lord [Shaftesbury]." (Mr. Hyett, House of Commons, July 1833.)
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> "It should be made evident that when you find things wrong, you do so with regret, and that the punishments of the law will be employed only against wilful and obstinate offenders." (A factory inspector's instructions to his assistants, September 1837.)

1. The Legal Issue and Sociological Research

Fear that the morally blameless might be sacrificed to unproven assumptions about the criminal law's peculiar superiority as a means of curtailing serious social evils is by no means new. It has, however, become intensified in recent years as more and more people have grown uneasy over a number of statutes embracing strict liability, a principle under which intention, recklessness or negligence are not specified as essential ingredients of the offences created. Reaching its peak with the much publicised case of *Sweet* v. *Parsley*[1] in which Lord Reid referred to "the public scandal of convicting on a serious charge persons who are in no way blameworthy . . . ,"[2] this concern has also come to be shared on a general level by the members of the Law Commission. In May 1968, nearly a year before Lord Reid's pronouncement, one of the Commission's working parties announced its bold intention of considering whether "the purposes for which such offences are enacted [could] be achieved by other means than through the machinery of the criminal law"[3] and, possibly anticipating a negative conclusion on this dramatic possibility, of considering also a number of ways to protect "persons who offend but who nevertheless are regarded as morally without blame."[4]

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[1] [1969] 1 All E.R. 347.

[2] *Ibid.* at p. 351.

[3] Law Commission's Working Party on Codification of the Criminal Law, Published Working Paper No. 17, 1968, p. 17.

[4] *Ibid.* at p. 18.

One of the Commission's suggestions in the latter context—severe restriction upon penalties—would merely alter the degree rather than the nature of strict liability's affront to tender consciences. The remainder, though not all legal innovations in themselves, would entail changes of a more basic kind in many criminal statutes. Offences of strict liability might be placed in "a lower or less serious category than 'crimes'"; the use of devices such as orders of prohibition might be extended; or a defence such as due diligence [5] might be provided as an escape route for the blameless.[6]

Several of the above possibilities raise issues which correspond to crucial theoretical problems in the sociology of law. In setting itself to consider the viability of securing the same objectives by means other than the criminal law, the Commission implicitly recognised important sociological questions about the functions of such law in general and, more specifically, about the role of many recent statutory enactments as active instruments of social policy and social change.[7] Similarly, the suggestion that strict liability offences might be placed in a different category from "crimes" even if, to use the Commission's own words, they were "left within the ambit of criminal law," [8] is echoed by those sociologists who seek to distinguish criminological categories such as "folk crimes." [9]

This area of convergence between legal and sociological problems, even if couched in somewhat different language, is certainly one of those in which cross-fertilisation between the two disciplines could be very fruitful. Such co-operation would contribute more however, to the long-term development of common theoretical perspectives than it would to resolution of the immediate dilemma about strict liability. In this less abstract context two practical questions remain paramount for sociologists and lawyers alike. Is it possible that the harshness of strict liability is substantially mitigated in practice by the wise exercise of discretion—that the law in action affords considerable protection to the morally blameless, even if, in particular instances, the law in books does not? Equally important, where a statute does provide some escape route, how effective is this as a safeguard for the morally innocent?

With regard to one statute embracing strict liability, the Food and Drugs Act 1955, the first of these questions has already received a negative answer from two non-sociologists, M. Smith and A. Pearson.[10] Equating moral fault or blameworthiness with intent, recklessness or negligence,[11] these investigators administered questionnaries to 149 chief inspectors in local authorities requesting information about the salience of these factors in the exercise of discretion. Nearly two-thirds of the respondents stated such considerations to be either irrelevant or much less important than the seriousness of the *actus reus* as gauged by factors like the degree of potential injury to health and the offender's previous record. Furthermore, the inspectors classified more than one-quarter of their own prosecutions as cases in which reasonable care had indeed been taken but in which it had been rendered of no avail by unavoidable accidents or the negligence of persons other than the defendant. Not quite certain whether to regard this state of affairs as " alarming " or " desirable," the investigators were nonetheless categorical in their substantive conclusions:

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[5] See below.

[6] *Op. cit.*, pp. 13 and 17.

[7] See, for example, Edwin M. Lemert's discussion of what he refers to as "active social control" in *Human Deviance, Social Problems and Social Control* (1967), Chap. 1.

[8] *Op. cit.*, p. 17.

[9] H. L. Ross, "Traffic Law Violation: A Folk Crime," *Social Problems*, Vol. 8, No. 3, 1960–61, 236–237.

[10] "The Value of Strict Liability" [1969] Crim.L.R. 5–16.

> " Local authorities are not prosecution crazy. They abstain from prosecuting in the great bulk of contraventions that come to their attention . . . yet this discretion, as exercised, is not dependent upon the presence or absence of blameworthiness or ' moral fault '." [12]

One major defect in this survey is its unquestioning attitude towards the inspectors' admitted concern about the previous record of offenders. To accept this admission as categorical evidence of an emphasis upon the *actus reus* rather than upon *mens rea* may be justifiable from the legal standpoint; but how accurately does such an interpretation reflect what actually happens in practice? An inspector might equally attach significance to the repetition of particular offences precisely because this seems to indicate a degree of negligence or even recknessness in the face of previous warnings or prosecutions. At a less specific level, he might interpret the number of previous contraventions, a factor to which Smith and Pearson make explicit reference, as a sign of general blameworthiness in a firm's attitude to its legal obligations. Moral fault or blameworthiness at this level of generality may not be legally identifiable concepts, it is true; but this need not mean that they are meaningless to those who enforce the law.

This research may also be criticised for its inadequate attention to the effects of the escape route provided under section 113 (1) of the Food and Drugs Act which reads as follows:

> " A person against whom proceedings are brought under this Act . . . shall be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings; and, if after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that

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[11] *Ibid.* at p. 8.
[12] *Ibid.* at p. 14.

> he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence."

Although Smith and Pearson acknowledge the existence of this defence, they restrict themselves to asking whether inspectors and defendants regard it as satisfactory.[13] They do not specify how closely anyone successfully pleading such a defence would conform to their criteria of moral blamelessness; nor do they tell us whether their respondents regarded it as having any immediate implications for the exercise of discretion. This latter omission is particularly curious since it appears to rest upon an assumption that because the onus of introducing and proving the defence lies upon the defendant, the inspectors remain oblivious to the relevant issues until they are raised by the defence. Such closely circumscribed thinking on the part of decision-makers seems improbable to say the least. It would imply that the decision to prosecute is not only taken without any reference to one of the possible outcomes, but also without any reference to the statute's further provision for a short-circuit procedure:

> " Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under subsection (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person." [14]

Together, these defects in the food and drugs investigation suggest that its portrayal of the subjective processes involved in decision-making may be grossly inadequate. Instead of penetrating behind the scenes to determine how the officials made sense of their own decisions at the time, Smith and Pearson draw general conclusions from retrospective interpretations of the discretionary process. On the one hand they neglect the understandable tendency for the respondents to present outsiders with a view of decision-making that is rationalised in terms of an officially sanctioned framework; on the other they ignore the dangers inherent in assuming that theoretical definitions and distinctions making sense to researchers must also make operational sense to those who are being investigated. In both of these ways their account of the enforcement of the Food and Drugs Act represents " reconstructed logic " rather than " logic in use," [15]

These are methodological and interpretative pitfalls of which sociologists have become increasingly wary in recent years. Perhaps not before time they have realised that *post hoc* and so-called "objective" sociological interpretations of behaviour, whether law-breaking or law-enforcement, may bear no more relevance to its explanation than do so-called "objective" legal tests of intention to its punishment. They have grown distrustful in particular of questionnaire surveys which invite responses falling within the investigator's own theoretical framework rather than within the virtually boundless limits of what actually transpired.

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[13] *Ibid.* at pp. 12–14.

[14] s. 113 (3).

[15] A. V. Cicourel, *The Social Organisation of Juvenile Justice* (1968), p. 10.

Perhaps the most obvious means of getting closer to events like law-enforcement as they occur is participant observation, an approach which after some years of neglect, has been successfully revived by some researchers who are anxious to circumvent the above difficulties. Frequently, however, such an easy solution is impracticable and when this is the case, the investigator is thrown back upon less direct methods of observing events as they take place. In particular he may usefully resort to analysis of the documents which officials produce as a routine and indispensable part of efficient bureaucratic procedure. Where access to such documentation is normally restricted to members of the organisation in question—where, unlike questionnaire responses, the data have been uncontaminated by any obligation to make sense to persons not sharing the same frame of reference—this technique may provide a relatively accurate picture of what actually happens when a law is enforced. With reference to strict liability, it may enable us to determine with greater certainty the extent to which factors such as "moral fault" and blameworthiness pervade the subjective processes involved in the exercise of discretion.

2. The Survey

The writer has recently completed an investigation into the enforcement of the Factories Act 1961, a statute which exhibits several parallels with the food and drugs legislation already mentioned. The principal focus of this research was upon sociological issues which arise from laws purporting to control "white-collar crime." Although its findings in this respect are discussed at length elsewhere,[16] some of the major results may be briefly related here.

During a period of four-and-a-half years, 200 firms randomly selected from those in one of the Factory Inspectorate's "districts" [17] had 3,800 contraventions formally recorded against them. Enforcement of the law in respect of these offences comprised 668 departmental decisions about appropriate action, several offences usually being subsumed under one decision. In ten instances, all of them cases in which accidents involving machinery in motion had occurred, decisions to prosecute were taken. None of the defendants in these cases offered any defence and all were subsequently convicted. Apart from the decisions to prosecute and a somewhat larger number of cases in which no formal action of any kind was taken, enforcement consisted in the dispatch of relatively standardised letters to the offenders. Some of these decisions, around 6 per cent. of all those taken, involved some threat of prosecution. The remainder, no less than 87 per cent. of the decisions, merely notified the occupier of " matters requiring attention." [18]

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[16] "White-Collar Crime and the Enforcement of Factory Legislation" (1970) 10 Brit.J.Criminol.

[17] This sampling restriction means that the results of the research cannot be claimed as typical of enforcement practice throughout the country.

In addition to this analysis of the decisions which were made about how to enforce the law, something of the more subjective approach described in the preceding section was also incorporated into the survey. This aspect of the research was based primarily upon examination of the reports and other documents which had been generated in the course of the Inspectorate's dealing with the same 200 firms during the period. Apart from the inevitable correspondence with occupiers and with some other individuals or organisations outside the department, these papers had been prepared exclusively for internal scrutiny. Their most important functions appeared to be those of ensuring continuity in the inspectorate's actions, of transmitting vital information between different levels in the hierarchy and of justifying decisions or recommendations to superiors. They were largely designed, therefore, to " make sense " to inspectors rather than to anyone else.

On account of its primary orientation towards a different kind of problem, this research cannot be represented as a systematic study of strict liability. Inevitably, however, a certain amount of information relating to this subject was thrown up in the various documents produced by the inspectors and particularly in their accident and prosecution reports.[19] Although the fragmentary nature of this evidence all but precluded any attempt at precise quantification, it is presented here for the light which it may cast upon the inspector's working rationale and more specifically, upon the importance they attached to factors such as " moral fault."

3. FAULT AND THE EXERCISE OF DISCRETION

Like the Food and Drugs Act 1955, the Factories Act 1961 provides a loophole which the morally innocent may use to avoid the full rigours of strict liability. This limited means of escape is set out in section 16 (1) of the Act as follows:

> " In England and Wales, a person charged with an offence under this Act shall be entitled . . . to have any other person

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[18] In some of these communications, around 12 per cent. of all the decisions taken, a rider of urgency was appended. Offenders were also frequently requested to notify the Inspectorate as to what action they intended to take.

[19] Although referred to as " prosecution reports " these documents are prepared as the first step towards instituting proceedings and include statements as to why such action is being recommended.

> whom he charges as the actual offender brought before the court at the time appointed for the hearing of the charge; and if, after the commission of the offence has been proved, the first-mentioned person proves to the satisfaction of the court—
>
> (a) that he used all due diligence to enforce the execution of this Act and of any relevant order or regulation made thereunder; and
>
> (b) that the said other person had committed the offence in question without his consent, connivance or wilful default;
>
> that other person shall be summarily convicted of the offence, and the first-mentioned person shall not be guilty of the offence. . . ."

Any factory-occupier raising and successfully proving this defence could scarcely be said to have exhibited intention, recklessness or negligence—the definitive components of what has already been referred to as "moral fault"—in connection with the offence. Nor, as suggested earlier, does the fact that the onus here rests upon the defendant necessarily mean that inspectors ignore the relevant issues until such times as the section is formally invoked. This seems even more improbable in the case of factory inspectors since a short-circuit procedure is not only available, as in the Food and Drugs Act, but also mandatory under circumstances specified in section 161 (4):

> "When it is made to appear to the satisfaction of an inspector at the time of discovering an offence—
>
> (a) that the person who would be proceeded against apart from this subsection has used all due diligence to enforce the execution of this Act; and
>
> (b) by what person the offence has been committed; and
>
> (c) that it has been committed without the consent, connivance or wilful default of the first-mentioned person and in contravention of his orders,
>
> the inspector shall proceed against the person whom he believes to be the actual offender. . . ."

The operational impact of these statutory constraints was most apparent in the inspectors' accident reports some 66 per cent of which traced the occurrence in question back to the commission of an offence.[20] When such a connection was specified, the position with regard to section 161 was usually spelt out in considerable detail, attention focusing first of all upon whether the offence had emanated directly from the act or default of someone other than the employer. Although distinct from any subsequent questions about the degree of the latter's "moral fault," this issue could sometimes be extremely complex particularly when the proximate causes of an offence were not easily adducible from the circumstances of the accident itself. Sometimes too, as illustrated in the following extract from a report on one fatality, it could be even further complicated when the liability of an employee could only be established under section 143 which specifies wilfulness as an essential ingredient of his offence [31]:

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[20] Since accidents are investigated on a selective basis this figure almost certainly reflects astute selection as much as any high correlation between accidents and offences.

> " There was probably a breach of section 29 (1) but it was not clear enough to warrant proceedings. If anyone was at fault, it was probably the employee who put up the [machine] props. But although he may not have put them up correctly, it could not be held under section 143 (2) that he wilfully endangered others."

But for a factory-occupier to be completely absolved from liability, whether by his own initiative or the pre-emptive action of the inspectorate, other issues apart from the role of a third party had to be taken into account. It was in this context that the accident reports showed considerable attention being paid to " moral fault " at the investigatory stage. Was there evidence that the management knew employees were infringing the Act? Even if there were no direct and incontrovertible indications on this score, was the contravention such a regular, everyday affair that managerial knowledge could be safely inferred? Were the works rules and the orders of those in authority conducive to obedience towards the law and, if they were, was supervision adequate to secure adherence from all but the most idiosyncratic or wilful employee? As illustrated by some typical extracts, two of them from initial investigation reports and the third from a divisional superintendent's request for further information before authorising proceedings, issues such as these were examined by the inspectors long before any initiative was taken by the defendant:

> " Proceedings [against the occupier] are not appropriate in this case . . . . What brings me to this conclusion is this thread of supervision by the Works Manager running through the statements."
>
> " The job has been done like this on several occasions. . . . The Manager admitted in a roundabout way that he knew this job had been done from time to time without a guard."
>
> " Who instructed or authorised the cleaning in motion? Did any responsible member of the management know that the injured person was cleaning in motion on that day? The injured person says he frequently cleans in this way—did the management know this? How do we get around the argument that he was cleaning in motion in contravention of the management's orders?"

In taking account of these broad empirical concomitants of section 161, the inspectors not only incorporated notions of something approaching "moral fault" into their decision-making but did so with every technical justification. It would be dangerous, however, to conclude from this evidence limited to rather special circumstances that the criteria for making decisions over a wider area were quite so precisely circumscribed by the law's specific prescriptions. Thus, for example, even when there was no question of an injured person rather than his employer being responsible for the *offence* associated with an accident, the contribution made to the occurrence of the *accident* by his foolhardiness or lack of thought could still be cited as an argument against prosecuting the employer. Indeed, this was one of the reasons most frequently advanced against legal proceedings in accident cases in spite of the technical distinction succinctly stated by one inspector who wrote "we are not tied to proving the accident was caused by the breach." A more marked divergence from statutory definitions and one not wholly dissociable from issues of "moral fault" is evident in the following passage from another inspector's reasons for suggesting that a prosecution should not be instituted:

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[31] s. 143 imposes general obligations upon employed persons.

> "Whilst ignorance is no defence there is no doubt that section 18 (2) was unknown to the Works Manager and once it was explained to him he was anxious to comply. My own feeling is that he would have complied before had he known about these requirements."

This question of statutory relevance assumes even greater importance in connection with another criterion which was widely utilised by the inspectors in their exercise of discretion about prosecuting. An analysis of the "special reasons" which they gave for recommending legal proceedings showed that "previous warnings" were explicitly cited in seven out of the ten proposals which led to action being taken during the period.[22] Conversely, the lack of any previous instruction was often put forward as an argument against prosecution, and in one case where such action was proposed following the detection of a particular offence for the first time, the inspector felt obliged to detail special reasons which, in his view, justified proceedings "despite the lack of any previous instruction."

The precise nature of the connection between these previous warnings and an employer's liability under the Factories Act may once again be summarised in the words of an inspector, this time reporting on a visit to a better than average factory:

> "Mr. X was very co-operative and requested detailed examinations of all machines so that he knew where he stood. I advised him that this was not practicable and reminded him that it was the firm's duty to obey the Act irrespective of specific comments by inspectors."

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[22] They were not, in other words, simply listed in the section of the form which requests details of previous inspections, warnings prosecutions.

Given this statement of the law in books, why should the law in action have restricted prosecution almost exclusively to those cases in which an instruction had already been given? One possibility here is that previous warnings derived their procedural relevance from the fact that they could be cited in court, thus presenting the inspectors with an opportunity to manipulate sentencing and, thereby, the deterrent value of any conviction. If such was the case, however, the reasoning must have remained at a very low level of consciousness for at no point did it find expression in the documents which were examined, a degree of reticence which would be surprising in view of the inspectors' forthrightness where similar procedural contingencies were involved:

> " If we prosecute, the firm could say that they were visited by a specialist inspector who saw this very machine and that they received no letter asking for guarding . . . they would no doubt make much of this in a plea of mitigation and might put the Department in an awkward light."

As suggested earlier, an alternative hypothesis would be that previous warnings were a significant factor behind the exercise of discretion because of their effect upon the inspectors' interpretation of subsequent violations. Not only may they have been taken as prima facie indications of enhanced " moral fault " but, no less important, may have been regarded as the normal prerequisite of prosecution precisely because they held this meaning for the inspectors. The documents prepared by the latter certainly produced ample evidence to suggest that it was in this capacity that previous warnings intruded into the discretionary process. As shown in the following quotation from a further prosecution report, the imputation of " moral fault " on these grounds could be quite explicit:

> ". . . it is clear that there has been considerable negligence on the part of the firm . . . there have been two previous accidents at roller intakes with previous instructions following them."

Similar inferences could even be drawn from a firm's failure to learn the general lesson implicit in a specific warning:

> " At the visit it was noted that they had put a supplementary guard on a similar machine adjoining, following letters which arose from an accident in July, 1958. Although the firm had obviously realised the danger of *that* machine, they did not carry out guarding on the similar machine involved in *this* accident."

A more detailed account of a short period in the Inspectorate's dealings with one offender, a firm of constructional engineers, illustrates very clearly how previous violations and the warnings almost invariably associated with them could lead to an altered interpretation of offences. In 1964, an accident occurred on this firm's premises when a " home-made " hook straightened, causing the tank which it was holding to fall. The occupier held no certificate of test and examination for this hook which had, in fact, been rigged up by the workman in the absence of any more suitable device provided by the management. A letter was sent to the occupier, pointing out the dangers inherent in this practice and requesting effective steps to ensure that only suitable lifting tackle would be used in future. His reply, typical of a number which were encountered during the survey, seemed to augur well for the future:

> " It is regretted that Mr. X was in fact making use of an unauthorised piece of lifting equipment against the instructions of his foreman. I will ensure that this matter is brought to the attention of our Safety Committee and that the dangers involved in using such equipment will be fully brought to the notice of all our works personnel."

Following this exchange, the firm could scarcely have pleaded total ignorance of the danger when, a year later, a similar accident occurred. On this occasion, an unsound and untested clamp, which had also been made on the premises, broke and caused a trench-cover weighing 14¼ cwt. to fall on two workmen, injuring one of them very seriously. The investigating inspector's report not only displayed a hardening of attitude but also portended a marked disinclination to accept any renewed plea of moral innocence based upon the alleged fault of employees:

> " This firm does not have a good record as far as lifting tackle is concerned; a similar accident occurred in 1964 and on this occasion the firm claimed that the use of a home-made hook was without their consent or knowledge. In spite of the firm's letter following this accident, the same sort of circumstances have been allowed to occur again, this time under the supervision of a foreman who the firm plainly regarded as competent enough to have such supervisory duties delegated to him."

Legal technicalities precluded prosecution on this occasion, but the comments which the district inspector appended to the investigation report left little doubt that had this means of enforcement been open to the Department, he would have supported its use:

> " Having regard to the past history of this firm, it is with dismay that I find I cannot prosecute on this occasion. I intend to make my views very clear to the directors of this firm."

In this case, the desire to prosecute—even if ultimately frustrated—was clearly based upon the District Inspector's appreciation of events during the preceding year. The " sense " which was made of the second violation, both in terms of the " moral fault " involved and of the response ideally required, was contingent upon knowledge of what had gone before. Such a contextual approach to decision-making underlines the need for sequential analysis in this as in many other areas of law enforcement; instead of issuing precipitately from discrete contraventions, prosecution frequently evolves as part of a protracted process. Stated in other terms, an inspector's frame of reference at any given point embraces an accumulation of information about what has transpired in the past and his decisions only become understandable when placed in this context as instalments in an ongoing sequence of " transactions " between the Department and the offender. It is only when viewed from this wider perspective that the part played by factors such as " moral fault " in the decision-making process can be fully appreciated.

Important as they were, however, previous offences and warnings formed only part of the backcloth to the exercise of discretion. Over the years, the inspectors had inevitably built up a much more diverse store of knowledge about particular firms and from this they were able to arrive at general assessments of attitudes, policies and priorities. Characterising employers in terms of varying approval and disapproval, their assessments emerged so frequently as pithy short-hand descriptions that there could be little doubt as to their shared meaning at all levels in the hierarchy. More important, they were cited in connection with enforcement recommendations to such an extent that the " typical " case for severe action could be described as incorporating some notion of " moral fault " at this more nebulous level. Where, for example, an inspector's experience of a firm suggested that its attitude was resistant, manipulative or just disinterested, there tended to be a perceptible hardening in the Department's response:

> ". . . my own impression of this place is that the management need gingering up. It is for this reason that I recommend proceedings. . . ."

Equally, when a generally light-hearted approach to legal requirements was perceived, this as much as the strictness of liability could lead to the offender's appearance in court. As one prosecution report put it, " this firm seems to regard legal requirements as trivialities and therefore proceedings are proposed." Even the lack of any previous warning could be over-ridden on occasion by a general impression, as is evident in the following quotation from an accident report which ultimately led to prosecution:

> " Whilst there has been no previous instruction on this machine, it is felt that the firm's negligence justifies proceedings. Their record is not a good one and there have been a number of recent accidents which have shown that *safety takes a poor second place to production.*"

This relegation of safety, health and welfare to a very inferior position was the general policy to which the inspectors appeared most sensitive. Many different signs including a firm's general record, its reluctance to allocate resources for the maintenance or improvement of conditions and its lethargy about any innovations not proffering obvious economic advantages, were used to identify such a faulty ordering of priorities. Sometimes, as can be seen in the following extracts from two directors' letters to the Inspectorate, the diagnosis can have required very little subtlety:

> " I have arranged, in accordance with the Act, for triangles to be set up where they will be audible. We had these in operation but they were condemned as not being in accordance with the Act by your Inspector. We are not disposed to consider spending money to the extent of hundreds of pounds on an electric klaxon system as we regard this as completely unnecessary and a complete waste of time."
>
> " These machines were purchased from X Ltd. and they formed part of a package deal involving all their plant and goodwill. . . . Nevertheless, when taking over this plant it soon became evident to us that some aspects of its efficiency and operating safety left much to be desired. You will appreciate, however, the importance to us of our commitment to satisfy the customer with deliveries. Our first aim, therefore, was to instal these machines and to maintain continuity of supply while considering the steps which we should take. . . ."

The Department's reaction to such blatant expressions of unacceptable attitudes can also be illustrated from the second of the two cases quoted above. What the author of this protestation did not know was that, even as he was writing, arrangements for the institution of proceedings against his firm for another violation were already under way, the action being justified on the grounds that the company had been " very lax " and had shown " poor diligence in maintaining even inadequate guards." What he could have foreseen, given a certain experience of the Inspectorate and a capacity for admitting occasional glibness in his statements of intent, was that four years later his firm would be prosecuted for failing to guard some of these self-same machines. However specific the charges on that occasion and however strict the liability, the fault perceived in the firm's general attitude was an important factor behind the decision to prosecute:

> " The attached papers will indicate an apparent willingness on the part of this firm to guard their machines properly. *My own view is that they are procrastinators. . . . Their method is clearly that guarding to any one machine is only carried out when that machine is taken out of use for major overhaul.* Consequently, despite the fact that this matter has been allowed to go on and on, my own view is that I must now take a firm line here."

The intrusion of a general notion of blameworthiness into the decision-making process was even more heavily underlined by the fact that where a low level of conformity was interpreted as the result of extenuating circumstances, the rule of strict liability did not leave the inspectors completely impervious to the difficulties an offender was thought to be facing. Where factors such as rebuilding programmes, changes in personnel or lack of resources could be held substantially accountable for a generally unsatisfactory performance the reports tended to emphasise these mitigating circumstances. Few of these inspectors would have dissented from the rather plaintively stated view of one director who explained that " while we realise the safety of all who work in the factory is a vital duty, we think it would be unrealistic not to admit that economics and practicability must also be taken into account." This did not mean, however, that the inspectors were easy prey for anyone with the sense to offer a good excuse. As one final case-history of an offender's progress towards the courtroom illustrates, the most determined efforts at manipulation could ultimately founder on the rocks of the inspector's proclivity towards long-term and general assessments of policy.

Following a visit to the factory in question, a letter listing no fewer than twenty-one items requiring attention was sent to the occupiers. Their reply requires no elaboration:

> " The report of your inspector's visit to these works has just been passed to me and . . . I am perturbed about some of the references made. It must be obvious that this Company is embarking upon a very considerable programme of rebuilding, aimed partly at improving the working conditions of our employees and entailing an extremely large financial outlay. For a temporary period this is causing overcrowding . . . and generally a breakdown in orderliness and tidiness to the extent that we are aware of limited transgressions of factory regulations. . . . It is therefore very disappointing and in my view quite wrong, as well as in extremely bad taste, that your inspector should suggest that basically our only interest is in production to the detriment of all else including normal consideration to the personnel side."

The District Inspector's response to this letter was placatory but firm. Although he admitted that reconstruction might be responsible, several of the matters nonetheless gave rise to " very serious concern "; conditions in one department showed that, far from there being only limited transgression, quite a number of the Act's sections were involved.

Six months later, the factory was visited again and the situation was found to be largely unchanged. The District Inspector wrote to the firm once more. There were still, he said, several matters causing serious concern. He appreciated the difficulty under which they were operating because of rebuilding but, and here his doubts begin to show, " many of the dangerous items . . . do not seem to be the immediate result of this reorganisation." Acknowledgment of the letter was requested as was notification as to " what action is now being taken to comply with the legal requirements of the Factories Act." To this the firm responded with a strong reassertion of the claim that rebuilding was responsible and a list of the work they intended to carry out, concluding:

> " From the foregoing it will be observed that more than

> reasonable notice has been taken of our present delinquent position and steps will now continue to bring us up to date in as short a time as conveniently possible."

Several months elapsed before the next visit to the factory. Again, a large number of matters were found to require attention and were accordingly notified to the occupier. The latter's response showed that whatever reorganisation interfered with, it certainly was not production:

> "As I pointed out during the visit, we were then in the stress of our peak period of trading which necessitates fullest possible concentration on production. Happily, this state of affairs has lasted longer than is usual, with the result that no time has been found to commence the necessary revision and initial work requested in your recent letters. . . ."

In his reply the District Inspector coupled an expression of his pleasure "that trade should have continued so steadily" with one of his regret "that you have not been able to complete the many items needing attention under the Factories Act 1961, during this period." But the gentle irony of this juxtaposition, if such it was intended to be, was clearly lost upon the recipients:

> "I am very grateful for the courtesy and forebearing tone of your letter. It is clear to us that you have a ready understanding of the many problems which beset us."

Such optimism was in its turn ill-founded. Over the succeeding months, the inspector's conviction that extenuating "problems" were not entirely or even substantially responsible continued to grow, culminating in a typification of the firm, some two years later, as one in which the "attitude to safety is excellent theoretically but is just not put into practice." With this confirmation that the occupier's actions belied his words, the process of enforcement changed gear, persuasion and argument yielding way to strong threats of prosecution. When the period covered by the survey came to a close, the factory was about to receive its second "check-visit," a procedure formally obliging an inspector to prepare a prosecution report unless the matters being checked upon have received attention. By casting himself as a well-intentioned employer facing insuperable problems, the offender may have slowed down the normal progression; but he had clearly failed to curtail it altogether. Clearly, also, his history of words unmatched by deeds was destined to be as important as the strictness of his liability in determining any action subsequetly taken against him.

4. CONCLUSION

The evidence presented in this paper suggests that far from being irrelevant, "moral fault" played a significant part in shaping the action which was taken against offenders. For this, some credit must undoubtedly be given to the legislators who constructed a legal framework which embraces concepts such as due diligence and wilful default. Wherever the onus is placed, this is a framework which cannot be ignored by those charged with the enforcement of the law. Only an official fairly mindless of his own position within the department would knowingly launch it upon a course of action which might culminate in a valid defence or, even worse, in the embarrassment of insinuations that its zest for prosecution is undiscriminating.

Avoidance of such outcomes can only be assured by paying attention to " moral fault "—or more precisely to the extent that its absence might be successfully argued—as part of the everyday routine of taking decisions about appropriate action. Thus, although the defence of due diligence linked to third party liability may only be used very rarely, this need not mean that its effectiveness as a means of protecting the morally innocent is minimal; its very existence as a possibility, however remote, ensures that " moral fault " cannot be completely ignored by the law in action. Those who argue for the provision of such a defence in other areas of strict liability would do well to emphasise its likely impact upon the agents of law-enforcement rather than its accessibility and attractiveness to morally blameless offenders.

While the legislators must be given their due, it must also be remembered, however, that statutory provisions and the procedural contingencies deriving therefrom are not the whole story. The decision to prosecute can also depend, as we have seen, upon an inspector's interpretation of offences in the light of previous warnings and upon his general assessment of a firm's attitudes and policy. However acute these interpretations and assessments, they bear little relevance to an offender's statutory liability. But they do cluster, it is suggested, around the issue of moral responsibility at a level of generality which is meaningful in terms of corporate behaviour. Perhaps this wise exercise of discretion not only further mitigates the harshness of strict liability but also comes to grips with violation of the law at its source.

That factors which are technically irrelevant should enter into decision-making in this way comes as no surprise. Sociologists have long recognised that officials faced with the task of processing large numbers of clients tend to rely heavily on their ability to sort them into " typical " or " normal " categories. More important, they frequently identify these " mere instances of a class " [33] by using criteria which are not strictly synonymous with those formally laid down. As Sudnow has pointed out,[34] the " socially relevant attributes " of a violation may play as great a part as its " statutorily conceived features " in determining the formal legal category through which it is processed and in which, we may add, it subsequently emerges as an item of hard datum for legal or sociological analysis. To the factory inspector, " moral fault " in this more general sense may be a socially relevant attribute of the typical case requiring prosecution.

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[33] E. Freidson, "Dilemmas in the Doctor-Patient Relationship," in Arnold Rose (ed.), *Human Behaviour and Social Processes* (1962).

[34] D. Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," *Social Problems*, Vol. 12, 1965, pp. 255–276.

But relevant in what way? Where such factors have no bearing upon statutory liability, the attention paid to them is unlikely to be the result of an organisational instinct for self-preservation. Nor in the case of the Inspectorate can it be dismissed as a rear-guard action designed to defend retributivism by ensuring that punishment is only meted out to the morally blameworthy and is therefore not debased. Such an approach would be inconsistent with the traditional stance of the department, which has always resolutely set its face against any philosophy restricting its role to the apprehension and punishment of offenders. Rather, it has consistently defined its function as being to secure compliance with the law and, equally important, to see that occupiers keep pace with the highest standards which may be reasonably expected at any given time.

Within this more active framework, prosecution based upon general impressions and previous warnings represents no paradox; for it is seen as " a tool of inspection " which can induce the necessary action on the one hand and changes in basic attitudes on the other. Legal proceedings are often instituted for their perceived efficiency in producing such results rather than for their appropriateness as a punitive response to violation. " Moral fault " is socially as well as statutorily relevant because where it exists prosecution may serve a useful purpose. This orientation ensures that punishment under the Factories Act is not imposed on purely retrospective grounds even though the criminal law's traditional concern with *mens rea* is to some extent incorporated into the enforcement process. Thus, while the inspectorate's concern with general aspects of " moral fault " further mitigates the harshness of strict liability, it does not reduce conviction and punishment to ritualised vengeance on the part of the state. Far from worrying about the law's efficacy resting upon " the secretly exercised discretion of middle-range executives,"[34] we should be asking whether the courts can so successfully combine a retrospective view of " moral fault " with a forward-looking perspective on punishment, that the discretion might safely be entrusted to them.

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[34] M. Smith and A. Pearson, *op. cit.*, p. 16.

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THE MODERN COMPANY AUDITOR—A NINETEENTH-CENTURY WATCHDOG?

WHEN Lopes L.J. in describing a company auditor faced with the possibility of the discovery of fraud and deceit in preparation of its accounts, equated him to a watchdog and not a bloodhound,[1] he would not have realised that his formulation was to become, not only the most popular formulation of the function of a company auditor, but also was to be relied on by the profession in the twentieth century as a basis for the standard expected of auditors. And from this base most allegations of breach of auditor's duties were and have been met.[2] Much water has flowed under the bridge since 1896 and yet in a recent decision of Pennycuick J. in the Chancery Court[3] the classical formulation of Lopes L.J. was the basis upon which the court chose to assess the role of a company auditor faced with similar questions of fraud and deceit. Those in favour of a continued development, in line with desirable standards, of the principle that shareholders of companies should be given better and more carefully assessed information about their companies, so that they may reach informed decisions about its management and their participation in it, would, it is suggested, and as will be seen from the ensuing discussion, wish to see a departure from the "watchdog" formulation.

The various organisations responsible for the setting down of accepted accounting principles lay down no specific rules relating to auditing standards. It can be ascertained from the evidence in the case of *Re Thomas Gerrard Ltd.*,[3] that the particular requirements expected by the profession in individual cases may be high but the standard texts of auditing reveal a heavy handed reliance on the watchdog test.[4]

It is proposed in this article to examine the formulation by the courts of the standards of care required of a company auditor in checking for errors, fraud and other discrepancies whilst complying with his statutory obligations (and where appropriate his contractual obligations) to audit the company's accounts. We shall discuss how far the company auditor is expected to ferret out fraud, inconsistencies and errors in the preparation of the company's accounts. It will not, however, be our concern to discuss in general terms the auditor's (or accountant's) duties according to the recognised principles of his profession superimposed upon the provisions of the relevant Companies Act.

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[1] In *Re Kingston Cotton Mill Co. (No. 2)* [1896] 2 Ch. 279, 288.

[2] See R. Buchanan-Dunlop "The Duty and Liability of an Auditor," *The Accountant*, November 19, 1955, p. 572. The reference to this expression in the cases is almost irresistible. See *e.g.*, *Henry Squire (Cash Chemist) Ltd.* v. *Ball Baker & Co.*, The Accountant L.R., Vol. XLIV, p. 25 as reproduced in *Dicksee's Auditing* (17th ed.) at p. 666 and cases discussed therein pp. 307 *et seq.* and *International Laboratories Ltd.* v. *Dewar et al.* [1933] 1 D.L.R. 34, 41.

[3] *Re Thomas Gerrard & Son Ltd.* [1967] 2 All E.R. 525—see note 17 *infra.*

[4] *Dicksee's Auditing*, *op. cit.*, at pp. 307 *et seq.*; *Irish Auditing* (3rd ed., 1966), Chap. 17.

In evaluating the usefulness of the "watchdog" formula one must refer to the provisions of the relevant companies legislation. It is not in this regard intended to discuss all of the auditor's duties either in respect of the annual audit or in relation to specific requirements—*e.g.* his obligations under the prospectus provisions.[5] Our task is made a little more difficult because of the lack of many cases specifically concerned with the duty of auditors to inquire where fraud or errors are apparent. The available decisions have been concerned primarily with allegations of failure by auditors to satisfy their obligations under general rules of company law, some of which are and were reinforced by specific provisions of relevant companies legislation,[6] or their obligations pursuant to contracts.

THE FUNCTION AND QUALIFICATIONS OF AUDITORS

The prime function of the auditor of a company is to audit the annual balance-sheet and profit and loss statement of that company.[7] How far his function has been reduced by accepted (if not openly approved) practice to a mechanical check of the figures on which these documents are based and how inadequate such a role is are issues, *inter alia*, we shall be specifically concerned with here.[8]

The relevant section of the U.K. Companies Act 1967[9] provides that the auditor's report shall state, *inter alia*: whether the accounts have been properly prepared and whether they give a true and fair view of the state of affairs and profit and loss picture of the company. The auditor is required to carry out investigations to reach an opinion on whether proper books have been kept and whether the accounts comply with the entries. Failure to comply should be noted. The auditor is given almost unlimited rights of "inspection" and any failure on the part of the officers to assist is required to be noted.

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[5] U.K. Companies Act 1948, s. 38—Sched. 4, Part II.

[6] Apart from breaches under the specific accounting provisions of companies legislation, many cases relate to the alleged approval of payments of dividends out of capital. See *e.g.*, *Lee* v. *Neuchatel Asphalte Co. Ltd.* (1889) 41 Ch.D. 1 and see *Dicksee's Auditing*, *op. cit.*, Chap. X.

[7] This involves the auditor in checking for the following: (i) fraud; (ii) technical errors; (iii) errors of principle. See *Dicksee's Auditing*, *op. cit.*, p. 27.

[8] The "accounting principles" relied on are referred to later and see notes 39 and 40.

[9] s. 14 (3). The whole section replaces s. 162 of and Sched. 9 to the Companies Act 1948. The relevant "Australian" provision is s. 167 of the various State Acts which correspond quite closely. The provisions are almost identical in each state and the legislation is often referred to as the Uniform Companies Acts. The relevant part of this provision (s. 14) are set out herewith:

"(3) The report shall . . . (*a*) state whether in the auditors' opinion

It is not our intention to deal in detail with his qualifications and with the various obligations that flow from his appointment. The companies legislation rather than setting out specific standards with which a company auditor must comply excludes certain " interested " persons from acting as a company auditor.[10] This implies that there is some concern that the auditor should be independent. An audit is an independent check of information which is contained in a company's annual accounts and in the company's records which are used in the preparation of these accounts. The auditor provides some assurance [11] that the disclosure made by the company to its shareholders, pursuant to its obligations, is reliable and in the auditor's opinion represents a " true and fair view " of the company's financial state of affairs. Thus apart from specific requirements in statutes it is clear that a company auditor is not permitted merely to rely on the work carried out by the company accountant in the preparation of the annual accounts. In the

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the company's balance sheet and profit and loss account and (if it is a holding company submitting group accounts) the group accounts have been properly prepared in accordance with the provisions of the principal Act and this Act and whether in their opinion a true and fair view is given—

(i) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year;

(ii) in the case of the profit and loss account (if it be not framed as a consolidated profit and loss account), of the company's profit or loss for its financial year;

(iii) in the case of group accounts submitted by a holding company, of the state of affairs and profit or loss of the company and its subsidiaries dealt with thereby, so far as concerns members of the company.

(4) It shall be the duty of the auditors of a company, in preparing their report under this section, to carry out such investigations as will enable them to form an opinion as to the following matters, that is to say,—

(a) whether proper books of account have been kept by the company and proper returns adequate for their audit have been received from branches not visited by them; and

(b) whether the company's balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account are in agreement with the books of account and returns;

and if the auditors are of opinion that proper books of account have not been kept by the company or that proper returns adequate for their audit have not been received from branches not visited by them, or if the balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account are not in agreement with the books of account and returns, the auditors shall state that fact in their report.

(5) Every auditor of a company shall have a right of access at all times to the books and accounts and vouchers of the company, and shall be entitled to require from the officers of the company such information and explanation as he thinks necessary for the performance of the duties of the auditors.

(6) If the auditors fail to obtain all the information and explanations which, to the best of their knowledge and belief, are necessary for the purposes of their audit, they shall state that fact in their report."

[10] See s. 161 of the Companies Act 1948 and s. 13 of the Companies Act 1967. The Acts exclude auditors who hold shares in the company, or who have certain financial or business interests.

[11] But he is not an insurer—see Lindley L.J. in *Re London and General Bank (No. 2)* [1895] 2 Ch. 673, 682–683.

N.S.W. case of *Dominion Freeholders Ltd.* v. *Spargo; Aird (Third Party)*,[12] the Court of Appeal rejected an argument put forward by a company auditor that his statutory obligation was satisfied by absolute reliance on the work which had been done by the company accountant in the preparation of the annual accounts.

Wynn-Parry J. in *Re Transplanters (Holding Co.) Ltd.* [13] distinguished the auditor from the accountant of a company. The latter was in every respect an agent of the company; the auditor on the other hand was not to be regarded for all purposes as an agent. The main reasons for his existence would disappear if he was to be subject to the same type of influence which would be exercisable over the accountant in the direct employment of the company. " Once a man takes upon himself a position of an auditor . . . he must stand aloof and divorced from the aims, objects and activities of the company." [14]

Further complications flow from the possibility that the auditor or firm of auditors may also be the management consultants to the company. No doubt the failure of certain advice given in this capacity will not be one of the items the auditor would wish to note in his report. It is quite clear that the auditor should not be concerned in his capacity as auditor with this aspect of the company's activities, but the lucrative contract which usually accompanies the appointment as managerial consultants may be too much an inducement to allow for a completely unbiased approach to the audit, especially where the issue of a qualified report may lead to the directors refusing to renew the appointment as managerial consultants and influencing, as they can so easily do in most cases, the appointment of another firm of auditors by the company.[15] In addition it is common for the auditor upon his " retirement " to be appointed a director of the company—this " perk " may also be lost.

There has been much written by academic and other accountants on this concept of independence.[16] It is suggested that whilst it is a highly desirable state, it is at the same time an unobtainable one, as it involves not just the absence of any direct relationship between the auditor to the company but requires the auditor to act with a state of mind that his work as auditor will not affect his future situation as auditor of the company or his other work for the company. There is no specific provision in the Act or in the case law which demands that an auditor is " independent " in this abstract sense.

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[12] [1966] 2 N.S.W.R. 203.

[13] [1958] 2 Ch. 711.

[14] Arnold, " The Neutrality of an Auditor " (1959) 26 *The Solicitor* 37–38.

[15] The auditor is appointed by the company in general meeting: see s. 159 (1) of the Companies Act 1948.

[16] See *e.g.* Higgins, " The Need for a New Rule on Independence," *The Journal of Accountancy*, January 1961, 37–42, and Carey and Doherty, " The Concept of Independence." *ibid.*, January 1966, 38–48 and references cited therein.

Apart from his independence the auditor must be competent and honest in the carrying out of his duties.[17] It is not necessary to examine these notions of competence and honesty. Some of the cases which we shall be discussing in relation to the " watchdog " function of the auditor deal specifically with the auditor's duty to inquire, but also directly and indirectly involve a consideration of these notions of competence and honesty.[18]

THE DUTY TO INQUIRE

We are concerned with the scope of the auditor's duty to inquire in completing his work for and on behalf of his client company. It certainly was the particular issue which Lopes L.J. was concerned with when he portrayed the auditor's position *vis-à-vis* his client company.

On two occasions in the 1890's courts in assessing the standard of care which an auditor must adopt in relation to this duty to inquire have handed down formulations of the scope of this duty. The first has not received the same degree of publicity or the same degree of discussion as the " watchdog " formulation of Lopes L.J. It is suggested that the " watchdog " formulation by Lopes L.J. in the case *Re Kingston Cotton Mill Co. (No. 2)* [19] is an expansion of the general theme propounded by Lindley L.J. in the case of *Re London & General Bank (No. 2)*: Lindley L.J.[20] noted that the " . . . auditors are to be appointed by the shareholders, and are to report to them directly, and not to or through the directors." The object was to ensure that the shareholders received " independent and reliable information respecting the true financial position of the company at the time of the audit." After rejecting the notion that the auditor was however an insurer who guaranteed the absolute " correctness " of the accounts his Lordship continued [21]:

> " Such I take to be the duty of the auditor: he must be honest—*i.e.* he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but,

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[17] His professional qualifications are ensured by the requirement that he belongs to a body of accountants established in the United Kingdom and recognised by the Board of Trade; or he must be individually authorised by the Board of Trade (Companies Act 1948, s. 161 (1)).

[18] See generally *Dicksee's Auditing*, *op. cit.*, Chap. XI.

[19] [1896] 2 Ch. 279.

[20] [1895] 2 Ch. 673, 682. The Bank was required by specific legislation to appoint auditors. This was not a general requirement at the time—see *infra*.

[21] *Ibid.* at p. 683.

> still an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required."

In the later cases Lopes L.J. added to this evaluation [22]:

> ". . . It is the duty of an auditor to bring to bear on the work he has to perform that skill, care, and caution which a reasonably competent, careful, and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said, to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog, but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest, and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion he should probe it to the bottom; but in the absence of anything of that kind he is only bound to be reasonably cautious and careful."

His Lordship however repeated the warning that to place too severe an onus on auditors was unjustified.

These formulations have been continually accepted by the courts since 1896 as the norm. Indeed there have been very few cases where the courts have been prepared to depart in any way from the standards outlined by their Lordships.

One of the issues which confront us is just how far these standards which were applicable in 1895 and 1896 should be accepted today. In 1896 there was in fact no statutory obligation on the part of a trading company (other than certain banking companies) to file annual accounts at the companies registry.[23] The articles on the other hand may have required the company to supply annual accounts to shareholders. Furthermore there was no legal obligation on the part of companies to appoint an auditor until 1900.[24] The introduction of legislation requiring accounts to be prepared, filed and distributed, together with the requirement that these be audited,[25] and the very substantial development of the statutory law in relation to the information that companies were to supply to the company registry and to their own shareholders has been regarded as one of the land marks in the developments of modern company law [26] It is suggested that in this background it is neither real nor acceptable to view the common law principles of 1896 as exactly applicable today. Whilst the standards outlined by Lord Lindley and Lopes L.J. in the 1890s are essential as background to any discussion of this subject they should be treated as subject to the statutory provisions and the understanding which now require that accurate and meaningful information be supplied. One is rather surprised therefore at the fact that Plowman J. in *Re Thomas Gerrard Ltd.* did not assess the need for a more commercially desirable and real evaluation of the function and standards of the company auditor although one cannot argue with his decision as such. Perhaps he was impressed, as so many before him, by the attractive watchdog formulation. It is at times interesting and at other times alarming to note how this formulation has been accepted, almost without comment, over the years. Yet there have been a few instances where a more "realistic" assessment has been made, in the light of the purpose of the company audit, of the function of the auditor and the expectations of those who invest.

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[22] [1896] 2 Ch. at pp. 288–289.

[23] See Edey and Panitpakdi, *British Company Accounting and the Law 1844–1900* as reprinted in Littleton and Yamey, *Studies in the History of Accounting* (1956). Such a requirement had been provided for in the Joint Stock Companies Registration and Regulation Act of 1844 (ss. 34, 35) but it was repealed shortly thereafter; see Edey and Panitpakdi, *op. cit.*, at p. 357.

[24] 63 & 64 Vict. c. 48.

[25] This was finally reintroduced, after much agitation, in 1907 (Companies Act 1907). See Edey and Panitpakdi, *op. cit.*, pp. 357 *et seq.* Contrast the position in Victoria when similar legislation was introduced in 1896: see Johnston and Jager, *Company Accounting* (1966) (2nd ed.), p. 41.

DEVELOPMENT OF THE WATCHDOG THEME

Lord Alverstone in *London Oil Storage Co.* v. *Seear Hasluck & Co.*[27] stated that

> "the auditor is . . . contemplated by law to protect the interest of the company and its shareholders as such. . . . He has got to bring to bear upon [his] duties reasonable and watchful care, but has got to discharge those duties remembering that the company looks to him to protect their interests. He is not, however, supposed to be a man constantly going about suspecting other people of doing wrong . . . he is not bound to assume when he comes to do this duty that he is dealing with fraudulent and dishonest people. . . . If circumstances of suspicion arise, it is the duty of the auditor, in so far as those circumstances relate to the financial position of the company, to probe them to the bottom."

One can sense a slight dissatisfaction with the comfortable watchdog formula in that extract. His Lordship went further along the same line in *Henry Squire (Cash Chemist) Ltd.* v. *Ball, Baker & Co.*[28] when he ventured a stronger test than the 1890s test. "Figures of speech are rather dangerous; all I venture to say is, that he has got to act as a reasonable man under the circumstances of the case. He may even be a detective in some cases if there is something to arouse the suspicion of a reasonable man." These statements were made in a time when the formal status of an auditor had been clearly expounded in companies legislation.[29]

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[26] Gower, *Principles of Modern Company Law* (2nd ed.) at p. 64.

[27] [1904] 31 The Accountant L.R. 1, reproduced in *Dicksee's Auditing*, *op. cit.* at p. 684.

[28] (1911) 27 T.L.R. 269, 271.

The recognition of suspicious circumstances by the auditor naturally depends on the facts in each particular case. The auditor cannot (in his capacity of auditor) act as a management consultant holding the directors' hands during every decision and guiding them through every crisis. His auditing obligations are sufficently difficult. Indeed, one would be surprised to see him utilise any information obtained in his capacity as consultant in the performance of his audit except where it bore directly on this task and only after he had discussed this with his client.[30] The decision in *Re Thomas Gerrard Ltd.* concerns the tedious but not unduly difficult task of the auditor in checking the stock on hand and the checking of invoices against stock.

The circumstances which may confront the auditor from time to time involve a variety of factors. For example in *Nelson Guarantee Corporation Ltd.* v. *Hodgson* [31] the court held that the auditor, who was aware that his client's bookkeeper had once been dismissed by another accounting firm for improperly borrowing money from the firm's clients, should have counselled the person responsible for the checking of this particular man's work in the audit of the company accounts, to exercise care. Other factors were that the bookkeeping of the client was in arrears, and in addition the particular bookkeeper had only recently been employed, thus being in a position where the auditors had no reason to treat him as a trusted and reliable servant. In these circumstances the lack of care by the auditor in guarding against the deceit which may have been perpetrated was treated as a breach of his duty. In the case of *Re City Equitable Fire Insurance Co. Ltd.*[32] one of the grounds alleged against the company auditor was that he had failed to detect what Romer J. described as "window dressing" and spurious "wash sales." Various sums of money which were being held by stockbrokers of the company were at the end of each year purportedly invested in certain treasury bills. These bills were always recorded as having been sold shortly after the end of each financial year. The company auditor was prepared to accept confirmation of the purchases of these treasury bills by relying either on a letter received from a firm of stockbrokers or by examination of the notes. However, as the books were never written up beyond the end of the financial year, the pretended sales of these bills shortly after the end of each year were not noticed until the following period. In dismissing the claim of negligence against the company auditors

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[29] However the requirements of independence referred to earlier had not yet been introduced.

[30] See *Dicksee's Auditing*, *op. cit.*, pp. 299–300. On the other hand he may be forced to rely on general information, not of a confidential nature, in the course of his audit.

[31] [1958] N.Z.L.R. 609—see particularly p. 619.

[32] [1925] 1 Ch. 407.

Romer J. commented [32]: "That it is the duty of a company's auditor in general to satisfy himself that the securities of a company in fact exist and are in safe custody cannot, I think, be gainsaid."

Referring at length to the proposition that an auditor must be satisfied that the securities do exist, Romer J. added that the comments of Lindley L.J. in the *London and General Bank* case, should not be interpreted as denying the auditor the right to rely on someone certifying that the securities existed. Romer J. continued [33]:

> "At some time or another it will, I think, have to be considered seriously whether it is not the duty of an auditor to make a personal inspection, in all cases where it is practicable for him to do so, whatever may be the standing and character of the person or company in whose possession the securities happen to be. Whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or, if his requirements be not complied with, to report the fact to the shareholders, and this whether he can or cannot make a personal inspection."

The Court of Appeal took a more "protective" view of the auditors. The Master of the Rolls commented that a certificate from the bank that the securities existed may well have been sufficient. He added [34]:

> "I do not wish in any way by anything that I say to discharge the auditors from their duties as laid down in the *Kingston Cotton Mill* case. . . . In my opinion it is for the auditor to use his discretion and his judgment, and his discrimination as to whom he shall trust; indeed, that is the right way to put a greater responsibility on the auditors. . . .
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> "In my view he must take a certificate from a person who is in the habit of dealing with and holding securities, and whom he, on reasonable grounds, believes to be, in the exercise of the best judgment, a trustworthy person to give a certificate."

This assessment throws on the auditor the task of ensuring that the person being relied on is "safe."

In the U.S.A. the famous "case" involving McKesson and Robbins Incorporated led to the issue of a special release on auditing by the Securities and Exchange Commission in which particular comment was made on the duty of public accountants (auditors) to detect fraud.[35]

The courts have also had to consider the duty of an auditor to inquire when appointed by local government bodies, or in other similar capacities. In 1900 Lord Russell of Killowen C.J. stated that the auditor of a local authority was not limited in his duty to see [36]

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[33] *Ibid.* at pp. 497–498.

[34] *Ibid.* at pp. 518–514. See also *National Society Corp.* v. *Heimbokel et al.*, 154 F. 2d 266 (1946) and see Dickerson, *Accountants and the Law of Negligence* (1966) at pp. 40 *et seq.* for further examples in Canadian and U.S. courts.

[35] As reproduced in Nielsen, *Cases on Auditing* (1965) pp. 112 *et seq.*, see especially p. 122.

> "whether there are vouchers, apparently formal and regular, justifying each of the items in respect of which the authority seeks to get credit upon the accounts put before the auditors for audit. I think that is an incomplete and imperfect view of the duties of the auditors. I think an auditor is not only entitled but justified and bound to go further than that, and by fair and reasonable examination of the vouchers to see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself, and the burgesses who create that authority."

This assessment of the scope of the auditors' duties was endorsed by Jenkins J. (as he then was) in *Re Ridsdel, Ridsdel* v. *Rawlinson*,[37] the "auditor" in this case being appointed to audit a judicial trustee's account. Lord Sumner had also accepted Lord Russell's "enumeration," although again in a different context, in *Roberts* v. *Hopwood*.[38]

The standards of auditing are nowhere clearly expressed by the bodies supervising the work of the profession—for example the Institute of Chartered Accountants.[39] There are certain recommendations made in relation to specific problems concerned with accounting, but in none of the cases referred to above in our discussion, nor in the recent *Thomas Gerrard* decision, were any specific recommendations referred to. Rather the court in *Thomas Gerrard* relied on the testimony of expert witnesses called by both parties to assess the standard of care to be expected of the auditor in the specific circumstances.

These recommendations deal with the acceptable methods of, for example, valuing stock in trade, the procedures to be adopted in dealing with price levels, the form of the balance-sheet and profit and loss accounts and so on. They do not deal with attitudes to be taken in relation to the detection of fraud or other discrepancies and indeed are no more than a guide. One learned accountant has calculated that by a combination of the various alternatives available to an accountant in preparing accounts, there can (validly) be well over one million true and fair views of a company's state of affairs.[39]

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[36] *Thomas* v. *Corporation of Devonport* [1900] 1 Q.B. 16, 21.

[37] [1947] 2 All E.R. 312.

[38] [1925] A.C. 578, 605.

[39] See the Recommendations of Accounting Principles issued by the Institute of Chartered Accountants in England and Wales which however do not deal at all with auditing as a separate discipline; in any event these "principles" are hardly more than a series of guidelines and do not lead to an acceptable standard of accounting. See Chambers, "Financial Information and the Securities Market," *Abacus*, Vol. 1, No. 1, p. 3.

It is not appropriate here to canvass the need for standards to be set out either by the profession or by the legislature[40]; but the absence of standards must make the task of any judge generally unacquainted with the language and tools of trade of the profession extremely difficult in cases like *Re Thomas Gerrard.*

A criticism of what tends to become a characteristic of auditing—*viz.*, its mechanical nature, was made in the Irish Court of Appeal in *Irish Woollen Co. Ltd.* v. *Tyson and Others.*[41] The company was found to have paid dividends out of capital. This was discovered from an examination of the accounts, which were found to have been falsified. A claim was made against the auditor by the company. This claim against the auditor (whose name was Kevans, the same name as the auditor in *Re Thomas Gerrard & Son Ltd.*) was based on three breaches of his duties:

1. that he failed to discover that the stock had been overvalued;
2. that he failed to discover that the book debts had been overvalued;
3. that he failed to discover that the trade liabilities had been understated.

The court found in favour of the auditor in respect of 1 and 2. With respect to allegation 3, Holmes L.J. said[42]:

> "I do not understand how the carrying over of the invoices (thus understating the trade liabilities) could have escaped detection by the auditor, who should have used due care and skill and who was not a mere machine. The invoices carried over were ultimately posted to the ledger. If they were posted to their true dates it would have been at once apparent that they were not entered in at the proper time. If they were posted under false dates, why was this not detected when the ledger accounts were checked with the invoices?"

There has been one more recent direct approach to this question. Lord Denning in *Fomento (Sterling Area) Ltd.* v. *Selsdon Fountain Pen Co. Ltd.*[43] spelt out a far more exhaustive and satisfactory test than that of the 1890s. His comments are, however, *obiter*—indeed the case did not arise from any alleged breaches of auditor's duties under company legislation, but whether certain contractual obligations had been fulfilled. Lord Denning used the traditional language of Lopes L.J. and Lord Lindley and spelt out a test which it is suggested has a very general application to auditing in general, and company auditing in particular. His comments whilst *obiter*, are nevertheless important and we therefore deal with the case in more detail.

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[40] See Chambers, *loc. cit.* and for a more detailed discussion see his book *Accounting, Evaluation and Economic Behaviour* (1966).

[41] (1900) 26 The Accountant L.R. 13, reproduced in *Dicksee's Auditing*, *op. cit.*, p. 608.

[42] *Ibid.* at p. 611.

[43] [1958] 1 All E.R. 11.

Auditors were appointed "for the purpose of verifying the amount of royalties payable" by the respondents in respect of patented articles. In the course of their investigation, the auditors found that royalties had been paid on certain refills (type "A") but not on certain other (types "B" and "C") refills. They thereupon requested further information about these refills. The respondent's reply was that "'B' and 'C' refills are not covered by patents." The auditors pressed for specimens or specifications but they received no more information.

Were the auditors bound to accept this assertion of the respondents as being honest, accurate and sufficient; or were they entitled to insist on further information to ascertain if the assertion was correct? This depended on the true construcion of clause 7 of the deed of terms. This clause provided:

> "7. The Selsdon Company shall keep or cause to be kept . . . all necessary books of account relating to the sale or distribution by it of the patented articles and containing such true and complete entries as may be necessary or appropriate for computing royalties and shall give to the said auditors *all such other information as may be necessary or* appropriate to enable the amount of the royalties payable hereunder to be ascertained as aforesaid." (Emphasis added.)

Lord Denning in assessing the obligations of the auditor stated[44]:

> "What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations; and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetical computations. He is not to be written off as a professional "adder-upper and subtractor." His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly, he must come to it with an inquiring mind—not suspicious of dishonesty, I agree—but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none. I would not have it thought that *Re Kingston Cotton Mill Co.* . . . relieved an auditor of his responsibility for making a proper check. But the check, to be effective, may require some legal knowledge or some knowledge of patents or other specialty. What is he then to do? . . . He may come on a payment which, it appears to him, may be unlawful. . . . He is, then, not only entitled but bound to inquire into it and, if need be, to disallow it; . . ."

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[44] *Ibid.* at p. 28.

Legal advice, suggested Lord Denning, could be obtained by the auditors if they so desired.[45]

In contrast to this statement Viscount Simonds adopted the "classical approach": He described the arguments of the appellants as follows[46]:

> "In effect the auditor says 'I have all the information which enables me to compute the amount of royalties on the articles which you say are patented, but how do I know that you are not mistaken or fraudulent? Let me see other articles that I may form my own judgment on them'. My Lords I cannot too strongly express the view that this forms no part of the right or duty of an auditor under such a clause as this. I say 'right or duty', for, if it is his right, it is also his duty . . . I cannot, however, forbear to recall that it has often been said that his duty is not detection but verification, and on one occasion more picturesquely that he is a watchdog not a bloodhound (see *Re Kingston Cotton Mill Co.* (*No. 2*), . . ."

THE THOMAS GERRARD DECISION[47]

This represented one of the rare occasions for the courts to evaluate the tests enunciated in the 1890s in the light of modern economic and business requirements.

Thomas Gerrard & Son Ltd., established in 1881, carried on a successful business of cotton spinners specialising in the manufacture of brocades. The issued capital of the company was £150,000. The company had a number of directors and a Mr. Croston, the managing director, conducted the day-to-day business of the company. The company's year of account ran from and to varying dates in March. Stock was taken half-yearly and the accounts were made up and audited half-yearly. The various accounts of the company for the relevant period indicated stability and continuing prosperity. Profits were earned for each of the relevant years. A dividend was paid by the company in respect of those years. The aduditors of the company, Messrs. P. and J. Kevans, had given unqualified reports under section 162[48] of the United Kingdom Companies Act for the relevant period and "up to the end of September, 1962 the skies remained unclouded."[49] Then came immediate and total disaster. It turned out that the company's accounts as presented year by year bore no relation to its true position and that the company was in fact hopelessly insolvent. The company was placed into liquidation and the liquidator brought proceedings against the auditors of the company (*inter alia*), claiming that he was entitled to receive on behalf of the company damages from the auditors under section 333 of the United Kingdom Companies Act 1948. That section provides:

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[45] See *Bevan* v. *Webb* [1901] 2 Ch. 59.

[46] [1958] 1 All E.R. at p. 17.

[47] [1967] 2 All E.R. 525.

[48] Now s. 14 of the Companies Act 1967.

[49] [1967] 2 All E.R. at p. 528.

> "If in the course of winding up it appears that . . . or any past or present director, manager or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator, . . . examine into the conduct of the . . . director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof . . . or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just."

The auditor is regarded as an officer of the company for the purposes of this section. It was ascertained that Croston had falsified the books of the company by using three methods.[50]

1. The half-yearly stock valuations were inflated by the addition of non-existing units to the existing units of stock. This was either done by including completely false parcels of stock or by increasing the amounts of the existing parcels of stock.

2. Accounts payable by the company on dates shortly before the end of each current period of accounts were transferred from the current period into the next period of account, thus reducing the amount of outgoings for the current period and increasing the profits. This was achieved, *inter alia*, by marking the relevant invoices "goods not received" or by altering the dates of invoices received by the company from various suppliers to dates in the next accounting period. It was a question of fact that the alterations were obvious and apparent and that some of them had come to the notice of the auditors during the course of their audits. This scheme was employed more substantially in each succeeding period.

3. Croston had caused the price on various sales of stock made by the company to be brought forward into the current period of account even though the sales were in respect of the succeeding period of account. To achieve this, the top copies of invoices were sometimes torn out of the relevant books and at times destroyed as well. On requesting an explanation as to the absence of these invoices, the auditors were advised by Croston that as the sales had been made at the end of the relevant accounting period, it was easier to omit the invoice from that period.

The auditors at no stage lost confidence in Mr. Croston's ability and believed that the stock-taking procedure adopted by him was being honestly and correctly operated. Expert witnesses called on behalf of both parties agreed that, as a general proposition, the direction by the Council of the Institute of Chartered Accountants that "it was the duty of the auditor of a company to arrive at an independent professional opinion on whether the directors have properly carried out their own duties in the preparation of the accounts and their presentation to shareholders,"[51] was applicable in this particular instance. Pennycuick J., referring to the independence of the audit, accepted the *Re Kingston Cotton Mill* (*No. 2*)[52] formulation that the auditor may rely on others for details of stock-in-trade.[53] If the auditor did not suspect the person relied upon he would be excused for accepting his word. Was there any "suspicion" which required the auditor to investigate the matter further?

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[50] *Ibid.* at p. 529.

The liquidator's expert witness suggested that when the auditors came across the various altered invoices their immediate reaction should have been to investigate the matter further[54]:

> "If the invoices were altered, then undoubtedly a complete examination should be made of all purchase invoices and, where alterations were seen, the suppliers should be communicated with as to the correct versions. At the same time, as this would be a serious matter, the completion of any report on the accounts should be held over and the board of directors informed."

The defendants' expert sought to excuse their actions.

> "I think the trouble in this case was the speed in which the directors required the accounts to be signed. This did not give sufficient time for the normal standard procedures, such as verification of the statements and so forth, to be dealt with. On the basis that they had to sign on the date, I think the questions they asked and given the evidence they asked, were all they could do, and if they were satisfied with the honesty of corroboration of the matters by the senior and trusted official of the company that they did all they could do."[55]

He agreed with the opinion of the liquidator's expert, but qualified this opinion by suggesting that time did not permit the auditors to carry out the investigations.

Counsel for the auditors also relied on the decision in *Re Kingston Cotton Mill Co.* (*No. 2*), to support the contention that it was sufficient for the auditors to rely on the advice given by Mr. Croston. Pennycuick J. contrasted that decision by relying on the facts. The facts in the *Kingston Cotton Mill* case he summarised as follows[56]:

> "Some years before the company was wound up, balance sheets signed by the auditors were published by the directors to the shareholders in which the value of the company's stock-in-trade at the end of each year was grossly overstated. The auditors relied on the certificates, wilfully false, given by J., one of the directors who was also manager, as to the value of

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[51] *Ibid.* at p. 582.
[52] [1896] 2 Ch. 279.
[53] *Ibid.* at p. 288, *per* Lindley L.J.
[54] Evidence of Mr. Macnamara [1967] 2 All E.R. at p. 582.
[55] Evidence of Mr. Philp, *ibid.* at p. 583.
[56] *Ibid.* at p. 585.

> the stock-in-trade. . . . If the auditors had compared the different books and added to the stock-in-trade at the beginning of the year, the amount purchased during the year, and deducted the amount sold, they would have seen that the statement of the stock-in-trade at the end of the year was so large as to call for explanation; but they did not do so. It was held (reversing the decision of Vaughan Williams J.) that, it being no part of the duty of the auditors to take stock, they were justified in relying on the certificates of the manager, a person of acknowledged competence and high reputation, and were not bound to check his certificates in the absence of anything to raise suspicion, and that they were not liable for the dividends wrongfully paid."

Pennycuick J. then went on to consider the merits of the instant case [57]:

> " This case appears, at any rate at first sight, to be conclusive in favour of Kevans as regards the falsification of the stock taken in isolation. Counsel for the liquidator pointed out that before 1900 there were no statutory provisions corresponding to section 162 of the Companies Act 1948.[58] That is so, but I am not clear that the quality of the auditor's duty has changed in any relevant respect since 1896. Basically, that duty has always been to audit the Company's accounts with reasonable care and skill. The real ground on which *Re Kingston Cotton Mill* is, I think, capable of being distinguished is that the standards of reasonable care and skill, are on the expert evidence, more exacting today than those which prevailed in 1896. I see a considerable force in this contention. It must, I think, be that it is open, even in this court, to make a finding that in all the particular circumstances the auditors have been in breach of their duty in relation to stock."

We would respectfully disagree with his Lordship's reluctance to accept that the legislative changes since 1896 were of little relevance. Accounts of trading companies were not required, in 1896, to be filed [59] or made available to the public. Further the information revealed in the accounts today is of a more sophisticated nature, and this of itself demands a greater degree of skill and competence on the part of the auditor in his task of giving an independent report.

Returning to the particular facts in the case before him Pennycuick J. found in favour of the liquidator. He did not deal with the methods of falsification described in (1) and (3) above.[60] With respect to the failure to check out the purchase invoices Pennycuick J. said [61]:

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[57] *Ibid.* at p. 536.

[58] Indeed not until 1929 was there any provision which required the type of information required by s. 162 and now by s. 14 of the Act of 1967. See notes 23–25, *supra*.

[59] Banks and certain insurance companies were subject to such requirements—see Edey and Panitpakdi, *op. cit.*

[60] [1967] 2 All E.R. at pp. 536–537.

[61] *Ibid.* at p. 537.

> "I find the conclusion inescapable, alike on the expert evidence and as a matter of business common sense, that at this stage 'the discovery of the altered invoices' he ought to have taken steps on the lines indicated . . . he should have examined the suppliers' statements and where necessary have communicated with the suppliers. Having ascertained the precise facts so far as it was possible for him to do so, he should then have informed the board. It may be that the board would then have taken some action; but whatever the board did he should in each subsequent audit have made such checks and such enquiries as would have insured that any mis-attribution in the cut-off procedure was detected. He did not take any of these steps. I am bound to conclude that he failed in his duty. It is important in this connection to remember that this is not a case of some isolated failure in detection. The fraud was repeated half-yearly on a large scale for many years."

He added that the alleged lack of time could not be argued to have made the auditor's position completely impossible.[62]

> "The auditors of the company owe a statutory duty to make to the members a report containing certain statements. If the directors do not allow auditors time to conduct such investigations as are necessary in order to make the statement, the auditors must, it seems to me, either refuse to make a report at all or make an appropriately qualified report. They cannot be justified in making a report containing a statement the truth of which they have not had an opportunity of ascertaining."

In finding the auditors guilty Pennycuick J. was reluctant to depart from "formula" in *Re Kingston Cotton Mill Co. (No. 2)*. His decision in this case whilst completely satisfactory on the facts before him, was disappointing to those who saw it as an opportunity to update the law. It is true that Lord Denning's dicta in *Selsdon Fountain Pen*[63] was not referred to in arguments. It is suggested that a more positive analysis of the position of auditors would have been a useful guide to that profession and to those working in this area of the law. Recent criticisms of the standard of auditing in certain company crashes indicate a growing discontent with the absence of an accepted code of accounting and auditing.[64]

In a decision of the High Court of Australia in 1960 two members of the court showed a less reluctant attitude in assessing the duties of auditors in detecting errors and fraud.[65] This particular case fits in line with the decision in *Thomas* v. *Devonport Corporation*[66] and is not authority with respect to the position of company auditors; but it offers a useful guideline and may be an indication of changes in judicial or legislative attitudes that might occur.

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[62] *Ibid.* at pp. 587–588.

[63] [1958] 1 All E.R. at p. 23.

[64] See Birkett, "True and Fair View—The Law and Accounting," 7 *Australian Lawyer*, p. 97 especially pp. 111 *et seq.*

[65] *President, Councillors and Ratepayers of the Shire of Frankston and Hastings* v. *Cohen* (1960) 102 C.L.R. 607.

[66] [1900] 1 Q.B. 16.

The defendant in this instance was an auditor appointed under the Victorian Local Government Act.[67] The duties required of the auditor under this Act were different to those required of a company auditor. However, the differences were not so great. A time limit was imposed within which the relevant work was to be fulfilled. The allegation made was that the auditor had failed in the fulfilment of his duties within this time limit. The actual decision on the facts is not relevant for our purposes. Fullagar J. in discussing the obligations of the auditor in such a situation commented[68]:

> "I do not subscribe to the doctrine that [the sole duty of the auditor] is to see whether there are vouchers . . . formal and regular, justifying each of the items in respect of which the authority seeks to give credit upon the amount put before the auditors to audit. I think that it is an incomplete and imperfect view of the duties of the auditor. I think an auditor is not only entitled, but justified and bound to go further than that, and by fair and reasonable examination of the vouchers see that there are not amongst the payments so made payments which are not authorized by the duty of the authority, or contrary to the duty of the authority, or in any other way illegal or improper. If he discovers that any such improper or illegal payments appear to have been made, his duty will certainly be to make it public by report to the authority itself."

This statement suggests that the auditor is not to be "the household pet," his duties are more closely equated to those expected of a bloodhound—he must go and ferret out information in support of the information before him. The duty thrown upon the auditor is not merely to check the figures, to be a professional adder-upper and subtractor but, indeed, to ensure that the figures are not only accurate but are based on reliable information, and that in addition, acts which are clearly illegal or improper are brought to the attention of those responsible for the company or authority.[69]

Menzies J. described the auditor of the shire in the terms of a watchdog,[70] but in doing so he emphasised that his duties might well involve not merely watching over the affairs of the authority, but in fact going out and checking to ensure that the authority was fully protected by his audit.

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[67] Act of 1946, Part XVI.

[68] 102 C.L.R. at pp. 619–620 quoting Lord Russell of Killowen C.J. in *Thomas* v. *Devonport Corporation* [1900] 1 Q.B. 16, 21. Fullagar J. added: "This passage has the force of dictum only, but it seems to me definitely to support the view which I take of this case" (102 C.L.R. at p. 620).

[69] *Cf.* Fullagar J., *ibid.* at pp. 618–619.

[70] *Ibid.* at p. 627.

CONCLUSIONS

The company auditor is not of course expected to ensure that the directors and the officers are acting within the law in all respects.[71] But he is expected, it is suggested, to advise where the company's actions are clearly improper or illegal where these are detectable by an examination of the books and documents or other records he as auditor is required to check. To take but one example, the payment of dividends out of capital by way of return of capital is a matter which, if detectable, as it should be in most cases, must be immediately reported, and if not acted upon by the directors, noted in the auditor's annual report to the company.[72]

Where then does the law stand following the decision in *Re Thomas Gerrard & Son Ltd.*? Where the auditor has been completely reliant on a company's officer who has been fraudulent, and there is some evidence that fraud does exist, the auditor must immediately investigate the matter further.

It is also clear that where discrepancies occur in the company's accounts, books or records, or any of these, and these discrepancies are detectable on appraisal, that immediate notification of such discrepancies should be made and if necessary a qualified report presented to the company. This does not place an undue burden on the auditor. But why should his detection be limited to cases where the clues appear before his eyes? What great burdens would be thrown on him if his duties included those Lord Denning suggested flow from his appointment? In what sense does he fulfil his obligation of conducting an independent check if he is to rely "blindly" (or subject to a formal check) on the word and the work of those in control of the company? A shareholder must expect and receive an unbiased and uninfluenced assessment by this expert of the financial position of his company. It is only the auditor who can fulfil the role expected of him. It is to be hoped that in the promised reform of company law in the U.K. and Australia some attention is given to this problem—one that has been neglected by the legislature in the past and one which the courts in general have been reluctant to examine in the light of changing needs in the commercial community.

R. BAXT.*

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[71] See *e.g.* comments of Astbury J. in *Re Republic of Bolivia Exploration Syndicate Ltd.* [1914] 1 Ch. 189, 171–172. See also Dickerson, *Accountants and The Law of Negligence* (1966), pp. 49–51.

[72] See *Dicksee's Auditing*, pp. 273–378.

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REPORTS OF COMMITTEES

Report of the Advisory Committee on Legal Advice and Assistance

Twenty-five years after the publication of the Rushcliffe Report,[1] twenty-one years after the passing of the Legal Aid and Advice Act 1949, and after five years of a Labour Government, the Lord Chancellor has been urged by his Advisory Committee to implement the Rushcliffe recommendations enacted in the 1949 statute.[2] The inadequacies of the statutory legal aid and advice scheme in the field of legal advice and assistance have been well known. Peter Benenson commented on this in 1957,[3] as did Brian Abel-Smith and Robert Stevens in 1967.[4] The Widgery Report in 1966 discussed the availability of criminal legal aid and advice.[5] Since then the Law Society,[6] the Society of Labour Lawyers,[7] the Conservative Lawyers,[8] the Child Poverty Action Group,[9] and the Cobden Trust [10] have all pointed to various deficiencies in the statutory scheme and made various recommendations. The list of people and organisations is wide-ranging: solicitors and barristers and judges, academic lawyers, sociologists and social workers, representatives of the most important of the legal profession's associations, and lawyers of varying political colour, have all urged that something should be done and, in many cases, made sensible recommendations. But it is perhaps significant that little has been published formally by the Bar Council, or by the National Citizens' Advice Bureaux Council, either on deficiencies or how to remedy them.

The Advisory Committee has steered a middle way between the proposals made by the Law Society, the Conservative and the Labour Lawyers and has in fact adopted the principal recommendations put forward by the Law Society in their second memorandum. In their first set of proposals the Law Society proposed a scheme whereby solicitors could do up to £25-worth of work, short of litigation, such as writing letters, drawing up documents. This was to remedy the long-acknowledged deficiency of the legal aid scheme which catered for oral advice, or litigation, but did not cover the letter-writing or negotiation which a better-off person would consider essential for the proper and efficient conduct of his affairs. The second proposal in their first set was aimed at remedying the shortage of, or unwillingness of, solicitors in certain areas to give statutory legal advice: the Law Society proposed employing liaison officers to work with citizens' advice bureaux.

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[1] Report of the Committee on Legal Aid and Legal Advice in England and Wales (1945, Cmd. 6641).

[2] Report of the Advisory Committee on the better provision of Legal Advice and Assistance (1970, H.M.S.O. Cmnd. 4249), para. 18.

[3] Peter Benenson, *The Future of Legal Aid* (1957, Fabian Research Series 191).

[4] B. Abel-Smith and R. B. Stevens, *Lawyers and the Courts*, Chap. 12.

[5] Report of the Departmental Committee on Legal Aid in Criminal Proceedings, (1966, H.M.S.O. Cmnd. 2934), Chap. 6.

[6] The Law Society, *Legal Advice and Assistance: Second Memorandum of the Council of the Law Society*, 1969.

[7] Society of Labour Lawyers, *Justice for All* (1968, Fabian Research Series 273).

[8] Conservative Political Centre, *Rough Justice*, 1968, CPC No. 424.

[9] Rosalind Brooke *et al.*, *A Policy to Establish the Legal Rights of Low Income Families* (1969), Poverty Pamphlet 1).

[10] Cobden Trust, *Legal Aid as a Social Service* (1970).

There were criticisms that these proposals would only ameliorate and not remedy the major deficiencies. The Conservative Lawyers recommended capital grants to draw solicitors to designated areas where there were no, or few, solicitors. They also suggested a rota of volunteer solicitors from private firms to run sessions at citizens' advice bureaux. The Labour Lawyers, like the Law Society, recommended salaried solicitors, but went further by saying these salaried solicitors should work in local legal centres in areas where no solicitors practise. The Labour Lawyers proposed that these centres should not only be open at hours and on days to suit a working community, but also should be able to advertise their services so that the local community could be educated to make use of lawyers' services.

The Law Society now proposes [11] not only the £25 scheme, and an expanded liaison advisory service, but also centres solely concerned with advice, and even centres providing legal help of all kinds. These would be staffed by solicitors employed by the Law Society and who will work from Local and Area Legal Aid offices. (These echo proposals made by the members of the Rushcliffe Committee twenty-five years ago.[12]) Although these proposals appear now to resemble those of the Society of Labour Lawyers, there are significant differences. The Labour Lawyers wanted first a new state salaried service, independent of the Law Society, and secondly, for the local legal centres to be able to do any legal work, which would therefore include representation before tribunals. (Legal aid has not yet been extended to tribunals although twenty-one years have elapsed since the 1949 Act, but the Lord Chancellor has now extended legal aid to the Lands Tribunal.[13])

The Lord Chancellor's Advisory Committee have accepted the Law Society's proposals in principle and recommend the Lord Chancellor to implement the £25 scheme for legal assistance. But the Advisory Committee has proved no St. George in the face of Treasury dragons. It did " not feel able, in view of the unknown scope and cost, to recommend the full scheme of liaison officers and legal centres at this stage but would welcome further voluntary experiments in the provision of legal assistance." [14]

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[11] The Law Society, *Legal Advice and Assistance: Second Memorandum of the Council of the Law Society* (1969); Appendix A in Report of the Advisory Committee on the better provision of Legal Advice and Assistance (*supra*).

[12] Report of the Committee on Legal Aid and Legal Advice (*supra*), para. 177.

[13] Legal Aid (General Amendment) Regulations, S.I. 1970 No. 690.

But we have had twenty-five years of experiments since the Rushcliffe Report; and before that there had been forty-five years of other experiments, while pressure for legal aid and advice in both civil and criminal proceedings was being put on unenthusiastic governments. How can there be more experiments when solicitors tell us how overworked they are, that they are not recruiting enough new solicitors, and have to struggle to pay their office overheads? The Bar is also prosperous. How many young barristers are willing to work long enough in experimental sessions to develop appropriate expertise to be of use to their clients? Anyway, why should poorer people continue to be experimented on? "To no man will we deny, to no man will we sell or delay justice or right." Magna Carta has still not been implemented!

The Advisory Committee, although not able to recommend the setting up of the full liaison advisory service and local legal centres, urged research (not from Government funds) into unmet need for legal services.[15] This is a valuable recommendation as it has encouraged some of the research foundations, previously reluctant to finance surveys into the legal profession and legal services, to make considerable funds available for surveys and action research in these areas. The Committee also urged that much greater publicity should be given to the legal aid and advice scheme,[16] and stressed that social workers should receive training about the statutory scheme. This is certainly another important recommendation—but how will it work out in practice? Many social workers contacting the Child Poverty Action Group do not usually know about legal aid and advice, and if they do, their knowledge is rudimentary and sometimes simply wrong.

But the recommendations that the Committee *does* make, appear to solve only the first two of the five reasons which they state to be those preventing people from getting legal help.[17] These reasons are:

> "(a) certain defects in the existing Legal Advice Scheme;
> (b) insufficient publicity for both the Legal Advice and the Legal Aid Schemes;
> (c) lack of solicitors in the areas concerned;
> (d) reluctance to consult a solicitor;
> (e) failure to recognise that legal remedies may be available."

In some areas there are no, or few, solicitors within easy reach and if someone is old, or has been injured, or is poor, or is a deserted wife with young children then he or she cannot be expected to travel far to seek legal help. " In 1966 the average ratio of solicitors in private practice per person was one to 2,650. This was so in Bournemouth, Bristol, Cheltenham, Hereford and Wigan. But in Pudsey, Wednesbury and Wallasey there was one solicitor for between 4–6,000 people, while in Batley, Leyton and Salford there was less than one solicitor for over 6,000 people." [18] The problem of legal services being denied simply through a lack of solicitors has not yet been faced, or tackled.

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[14] Report of the Advisory Committee on the better provision of Legal Advice and Assistance (*supra*), para. 40 (d).
[15] *Ibid.*, paras. 35–36.
[16] *Ibid.*, para. 40 (e).
[17] *Ibid.*, para. 5.

The charge of inconsistency can also be levelled against the Advisory Committee. They recommend against a state-salaried service for local legal centres [19] on the ground that the management committee suggested by the Society of Labour Lawyers " could not really succeed in managing the centres or in insulating them from pressure." Yet in their weak exhortation for money for citizens advice bureaux,[20] they want to see " greater co-operation between them and local authorities and increased support given to them." Local authorities in some areas have been reluctant to finance, or to continue finance for citizen's advice bureaux and if the bureaux took a tougher line about advising their clients and standing up for their rights,[21] they could well be involved in conflict with the grant giving local authority. The CABs, as much as lawyers, would need insulation from potential pressure and it would seem unkind to solicitors to imply they are more susceptible to pressure and so need greater insulation devices.

Indeed it is on the subject of citizens' advice bureaux that the Advisory Committee could have been much stronger. They say " we are placing much reliance on the National Citizens' Advice Bureaux Council and upon individual bureaux for arranging that those in need of legal assistance get the help they need," [22] and point out the (often) slender financial resources at local, and certainly at central level. Much more cash should be made available to CABs, if they are to play such an effective sorting and referral role as is depicted by the Advisory Committee. But the cash should come from central funds, to avoid both variation in local provision, *e.g.* where an authority will not finance a service—by no means all English and Welsh county boroughs have CABs [23]—and to provide the insulation seen by the Advisory Committee as so important for the solicitors. Here we probably need a National Citizens' Rights Corporation, which could finance the CABs, and local legal centres.[24]

One of the central problems for poorer families is quite simply the lack of knowledge and expertise on the part of lawyers. This is particularly true in the fields of council housing, Part III accommodation, supplementary benefits and social security. This can partly explain "the failure to recognise that legal remedies may be available." How many solicitors know about the intricate legal problems arising under the 1966 Ministry of Social Security Act? It is most disappointing that the Advisory Committee seemed so blind to the potential legal problems of low income families, and to the need for much innovation, both in legal institutions and procedures on the part of lawyers. Both the National Council for Civil Liberties and the Child Poverty Action Group within one week recently advertised for full-time, experienced solicitors. But their contribution can necessarily not be great compared to the overall problem. Solicitors working full-time in centres would be one of the important methods by which "poor people's law" could be tackled and their rights no longer denied.

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[18] Rosalind Brooke, " Why not More Legal Help? " *New Society*, March 31, 1966.

[19] *Advisory Committee Report* (*supra*), para. 19.

[20] *Ibid.*, para. 38.

[21] Rosalind Brooke, " Civic Rights and the Social Services " (1969) 40 *Political Quarterly* 95–96.

[22] *Advisory Committee Report*, para. 38.

[23] The author is currently doing a survey of the extent and nature of advice and information services, financed by the Nuffield Foundation.

[24] B. Abel-Smith and R. B. Stevens, *In Search of Justice*, p. 271.

It is understandable that the cost of legal aid to the litigant, and the financial scope of the scheme were not discussed, as these were dealt with earlier.[25] The income limit for legal advice has at last been raised,[26] but the capital limit remains unchanged. The Advisory Committee accepted yet a third income and capital limit for the £25 scheme. So there are now to be *three* different sets of means test figures (for advice, for the £25 procedure, for legal aid). The £25 procedure will be free to those on supplementary benefit, or who have a net weekly income of £8 or less. Those with net weekly incomes between £8–£15 will pay contributions from £1–£10 according to income.[27] This certainly adds to the "hideous complexity"[28] of the civil legal aid and advice scheme.

Of course the £25 scheme will fill the gap between advice and aid—but for how many people? It is disappointing that the flanancial intricacies of the scheme not only remain but have been increased by the Committee's recommendations. Why not at least raise the income limits and make the £25 procedure non-contributory? If all twelve liaison officers were appointed and a number of centres, recommended by the Law Society, were functioning by the end of 1970, the statutory legal aid scheme would look in much better shape to cope with the legal problems of low income families. The Child Poverty Action Group memorandum concluded that there was still much injustice to be met within the legal system by such families,[29] while Cobden Trust maintains that "It is clear, although not generally stated, that the trend since 1949 has on balance been one of decline. The 1949 Act with its relatively generous scales, its apparent inclusion of tribunals and its promise of legal advice to all, represented a high point from which there was a retreat despite improvements in some respects."[39] It can only be hoped that if the research recommended by the Advisory Committee is undertaken and if the results show unmet legal needs, mal-distribution of services and mal-functioning of those services, that *then* the Committee and the Lord Chancellor will act. Research can so easily be an excuse for delay, and still, when the work is complete, produce no action.

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[25] Lord Chancellor's Office, *Report of the Law Society and Comments and Recommendations of the Lord Chancellor's Advisory Committee, 1966–67*, H.M.S.O., 1968, p. 61.

[26] *Hansard*, House of Commons, Vol. 801, May 14, 1970, col. 1647.

[27] *Advisory Committee Report*, Appendix A, p. 14.

[28] Cobden Trust, *Legal Aid as a Social Service*, p. 21.

[29] Rosalind Brooke *et al. op. cit.*, note 9, *supra*, p. 482.

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[39] Cobden Trust, *op. cit.*, p. 67.

NOTES OF CASES

POLICE POWER TO STOP WITHOUT ARREST

Donnelly v. *Jackman*[1] was a decision of the Divisional Court to affirm the summary conviction of the appellant for assaulting a police officer in the execution of his duty.[2] The appellant was walking along a pavement when he was approached by a police officer to make inquiries about a crime which he had cause to believe had been committed by the appellant. Despite repeated requests by the officer to stop, the appellant walked on. The officer tapped the appellant on the shoulder; the latter stopped and tapped the officer on the chest, saying, " Now we're even, copper," and walked on. The officer again touched the appellant's shoulder in order to stop him, whereupon the appellant struck him.[3] The magistrates found that at no time did the officer intend to make a formal arrest, but intended only to stop and speak to him, and that before the officer touched the appellant's shoulder for the second time he knew that the appellant did not wish to stop. The court held that at the time of the assault the officer was acting in the execution of his duty.

Two preliminary points may be made before the judgment delivered by Talbot J. is examined more closely. First, this is another decision that appears to unsettle the law by extending in a novel and ill-defined manner the scope of police powers at common law.[4] Secondly, it is unfortunate that the court was prepared to give a potentially very important decision although on a crucial matter the finding of fact was vague. The court was prepared to assume that the second touching of the appellant's shoulder was only a " trivial interference with a citizen's liberty."[5] Leaving aside the question of whether any physical interference with a person against his will by a police officer should ever be properly characterised as trivial, it is surely especially important in areas of the law relating to civil liberties that judges should formulate legal rules against a factually precise background. It is noticeable that in the United States Supreme Court, where " minor " cases such as this are treated as raising important constitutional issues, far more meticulous scrutiny is given to the record of the lower court.[6]

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[1] [1970] 1 All E.R. 987.

[2] Police Act 1964, s. 51 (1).

[3] The officer then arrested the appellant for assaulting him in the execution of his duty; the only ground upon which the arrest could lawfully have been made was for a breach of the peace; but *quaere* whether, since the assault was over, the arrest was lawful even on this ground, assuming that no renewal of the breach was reasonably anticipated. Contrast *Lewis* v. *Arnold* (1830) 4 C. & P. 354 and *Derecourt* v. *Corbishley* (1855) 5 El. & Bl. 188 with *Cook* v. *Nethercote* (1835) 6 C. & P. 741 and *Baynes* v. *Brewster* (1841) 2 Q.B. 375.

[4] See also *Chic Fashions Ltd.* v. *Jones* [1968] 1 All E.R. 229 and *Ghani* v. *Jones* [1969] 3 All E.R. 1700.

[5] [1970] 1 All E.R. 987, 989. It is at least as likely that the officer did rather more than merely place his hand lightly on the shoulder of a suspect who had already clearly shown his unwillingness to stop.

The court justified its view of the ambit of a police officer's duty by falling back on the general statement in *Rice* v. *Connolly*,[7] that,

> ". . . it is part of the obligations and duties of a police constable to take all steps which appear to him to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury."

This statement appears to have referred to the preventive duties of the police and the court could have used the more apposite following sentence in Lord Parker C.J.'s judgment where he said that in addition to those already listed the powers and obligations of the police " include the duty to detect crime and bring an offender to justice." [8] But in *Rice* the officers were merely asking the suspect questions; he had not been stopped against his will and the officers were not prima facie invading any legally protected interest by so doing. The court in *Rice*, however, did not rely on a general statement of the duties of the police in holding that the accused's refusal to answer their questions was not an obstruction in the execution of their duty. In Hohfeldian terms, the police in the performance of their functions have a privilege to question but no power to require an answer. But in *Donnelly* the privilege of requesting a suspect to stop and answer questions was used without more to establish the existence of a legal power to require him to stop. The fallacy of this reasoning was pointed out by Ashworth J. in *R.* v. *Waterfield and Lynn*,[9] a case relied on in *Donnelly*, but not for this statement:

> " Thus while it is no doubt right to say in general terms that police constables have a duty to prevent crime and a duty, when crime is committed to bring the offender to justice, it is also clear from the decided cases that when the execution of these general duties involves the interference with the person or property of a private person, the powers of a constable are not unlimited."

The manner in which the court distinguished the authorities that appeared to support the appellant was no more convincing. Of

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[6] See, for example, *Spinelli* v. *U.S.* (1969) 393 U.S. 410 (probable cause for issue of search warrant) and *Cox* v. *Louisiana* (1965) 379 U.S. 536 (likelihood of breach of the peace); contrast the vagueness on a similar point in *Duncan* v. *Jones* [1936] 1 K.B. 218.

[7] [1966] 2 Q.B. 414, 419 (*per* Lord Parker C.J.).

[8] *Supra.*

[9] [1964] 1 Q.B. 164, 171. The doubts expressed by Lord Denning M.R. in *Ghani* v. *Jones* (*supra* at p. 1704) about the correctness of *Waterfield* on the scope of a police officer's power to seize property reasonably suspected of being either the instrument or fruit of a serious crime from a person believed to be implicated in it, does not affect the passage quoted.

Davis v. *Lisle*[10] Talbot J. said that in that case the police officer, after being requested to leave the appellant's premises, was a trespasser and therefore not acting in the course of his duty. But in *Donnelly* the officer, knowing that the appellant did not wish to stop and speak to him, was equally a trespasser when he nonethe less touched his shoulder. It is difficult to see why in this context the law should afford less protection to the person than to his property. *Kenlin* v. *Gardiner*[11] was distinguished on the ground that the police officer had taken hold of one of the boys and had in fact detained him. But it is surely odd to say that a police officer acts within the ambit of his powers when he commits a prima facie battery upon a suspect in order to stop and question him, but that once he has stopped, the officer has no legal power to detain him for this purpose without making an arrest. A police officer, like any other citizen, is not acting unlawfully when he stops another in the street to speak to him and touches him on the shoulder to attract his attention. An assault committed on an officer in these circumstances would be in the course of the execution of his duty, but not when the officer is himself in breach of a legal duty.[12]

The scope of the power established in *Donnelly* is unclear. First, what amounts to a cause to believe that the person stopped for questioning had or might have committed an offence is obscure. A purely subjective standard would involve an undue interference with personal freedom; an objective standard that was less than that required to make an arrest at common law without warrant would be difficult to define and liable to lead to confusion in the minds of both public and police.[13] Any increase in crime detection attributed to this new power may well be cancelled out by a decrease in public co-operation. Secondly, it is not clear whether the power to require a suspect to stop applies irrespective of the degree of seriousness of the offence.[14] Thirdly, because the case stated did not specify precisely what the officer did in his attempt to stop the appellant, it is not clear what measures a police officer may take[15]; for example, if the suspect starts to run, may the police officer trip him?

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[10] [1936] 2 Q.B. 434.

[11] [1967] 2 Q.B. 510. Because of the vague finding of fact in *Donnelly*, it is impossible to compare the seriousness of the assaults in the two cases.

[12] See *Robson* v. *Hallett* [1967] 2 All E.R. 407.

[13] A common standard found in statutory powers to stop and search is the existence of reasonable grounds of suspicion: see, for example, Protection of Birds Act 1967, s. 11, Road Safety Act 1967, s. 2, Firearms Act 1968, s. 47 (3). In *Terry* v. *Ohio*, 392 U.S. - (1968) and *Siron* v. *New York*, 392 U.S. 40 (1968), the United States Court recognised as constitutionally valid a police power to stop and question a person reasonably suspected of having committed an offence on grounds that would not constitute probable cause for arrest. The difficulties in distinguishing between the standards, and the largely subjective manner in which the reasonable suspicion standard is applied are pointed out by Paul G. Chevigny, *Police Power*, Chap. 11.

[14] *Cf. Ghani* v. *Jones* (*supra* at p. 1705) where Lord Denning M.R. restricted the common law power to seize property from persons suspected of being implicated in *serious* crimes.

The wider importance of *Donnelly* v. *Jackman* is that it invites a future court to establish a common law power to stop and detain for questioning without an arrest[16]; for there is no satisfactory distinction between *Donnelly* and *Kenlin* v. *Gardiner*. It is, of course, true that the police have powers short of arrest to preserve the public peace, but the weight of authority limits them to situations where an arrest could lawfully have been made.[17] Moreover, the function of these powers is preventive. For other situations English law is correctly summarised in *Blundell* v. *Att.-Gen.*: [18]

> "It is not sufficient for the constable to say: I am going to arrest you: I do not know yet, but I will restrain you in the meantime while inquiries are made. The citizen is entitled to inquire from the constable whether or not he is arrested. If he is not arrested, he must be free to go on his own way without restraint by molestation."

Finally, a satisfactory result could have been reached in *Donnelly* by the court's quashing the conviction and sending the case back for a determination as to whether the appellant was guilty of common assault for using more force than was reasonably necessary to defend himself from the police officer's unlawful conduct.[19]

J. M. EVANS.

SUISSE ATLANTIQUE CONFOUNDED?

IT is tempting to welcome the judgments in *Harbutt's Plasticine Ltd.* v. *Wayne Tank Co. Ltd.*[1] as the lawyers' touchstone for determining the consequences of a serious breach of contract. The complexity of the law concerning the effect of exclusion or limitation clauses on the rights of the innocent party has been exorbitant; yet the solution outlined by Lord Denning M.R., Widgery and Cross L.JJ. is appealingly simple. When a party commits a serious or fundamental breach of contract, the other party usually has an election to affirm or disaffirm. If the innocent party elects to affirm the contract, he cannot later deny the applicability of any exclusion clauses it contains: he cannot approbate and reprobate. The problem then is to construe the clause to see what effect, if any, it has. If, on the other hand, the innocent party disaffirms the contract, it ends *in toto*. In such a case, it is said, the party in breach cannot rely on any clause in his favour because the contract has been brought to an end as a result of his breach. Therefore the clause has no application and does not fall to be construed. In *Harbutt's Plasticine* the contract came to an end at the same moment as the breach occurred, because the breach was of such a nature as immediately prevented further performance of the contract. In such a case there is no need for the innocent party to evince an intention to disaffirm, because affirmation is out of the question: *lex neminem cogit ad vana peragenda*. According to the court, the result was no different from that where a party exercised an election to disaffirm. The contract ended, and the benefit of the exclusion clause therefore went with it.

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[15] "A person may use such force as is *reasonable in the circumstances* in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders. . . ." Criminal Law Act 1967, s. 3.

[16] In addition to the problems raised in the text on the scope of a power to require a suspect to stop, a power to stop and detain raises others, *e.g.* the length of time allowed for questioning, whether the detention may be in the street or inside a police station and whether there is any power of search incidental to the stop. In *Donnelly* the court made no observations on the finding that the officer did not intend to arrest; difficulties in distinguishing between an intention to arrest and to stop and question seem inevitable.

[17] See *Humphries* v. *Connor* (1864) 17 Ir.C.L.R. 1; *O'Kelly* v. *Harvey* (1888) 14 L.R.Ir. 165; *Thomas* v. *Sawkins* [1935] 2 K.B. 249 (but note Lord Hewart C.J.'s wider *obiter dicta*). In *R.* v. *Hagan* (1837) 8 C. & P. 167, the accused was playing bagpipes in the highway at night and a crowd of "dissolute persons" was gathering. Coltman J. directed the jury that if the officer laid his hand on the accused's shoulder and told him to move on he was acting within the course of his duty. This may be explained on the ground of a reasonably anticipated breach of the peace or *volenti non fit injuria*. See also note 15 *supra*.

[18] [1968] N.Z.L.R. 341, 351 (*per* Turner J.). See also *R.* v. *Katchmor* (1961) 36 W.W.R. 467. But contrast *R.* v. *E.* (1959) C.R. 69.

[19] *R.* v. *Wilson* [1955] 1 All E.R. 744.

[1] [1970] 2 W.L.R. 198; [1970] 1 All E.R. 225 C.A. The defendants, under a contract to design and instal piping to convey liquid stearine at 120°–160° F. in the plaintiffs' factory, installed plastic "Durapipe." Durapipe softens under heat and begins to distort at 187° F., but the temperature of the molten wax

The premise that when a contract ends all its terms end with it is only partially true, and it is submitted that *Harbutt's Plasticine* perpetuates a fallacy previously exposed by Professor Guest.[2] When a contract ends as a result of frustration, or election to disaffirm, it ends at the moment the frustrating event occurs, or the election is made. Until such time the contract remains valid and binding, and all its terms continue to operate as agreed between the parties. Hence the innocent party may sue the other for breach of a contract which was terminated for that breach, because at the moment of breach the contract was in force. Hence, also, rights and liabilities which arise before termination are not destroyed. In short, neither frustration nor election to disaffirm can avoid a contract *ab initio*, but can only put an end to future rights and

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was to be controlled by a thermostat attached to wires wrapped round the piping. Because Durapipe is of low thermal conductivity, the thermostat controlled not the temperature of the wax, but that of the outside of the pipe, which was lower. At the trial, Stephenson J. found that this equipment was wholly unsuitable for its purpose. The day before testing, the apparatus had been switched on and left overnight, unattended, to warm up. During the night the pipe sagged and cracked, wax escaped and ignited, and the factory was burnt down. The loss was calculated as £172,966. The defendants relied on a clause purporting to limit their liability to the contract price (£2,330) The plaintiffs had judgment for the total loss, and the defendants' appeal was dismissed.

[2] Anson's *Law of Contract* (1969 ed.), pp. 156–157. See also *Chitty on Contracts* (1968 ed.), p. 789, s. 788.

liabilities.[3] Any redress which may be given to the injured party in respect of losses or liabilities incurred before termination for breach, is not founded on the absence of a contract but on quasi-contractual principles of restitution.[4]

Lord Denning M.R. said in *Harbutt's Plasticine* that all this was "so obvious that it needs no authority." [5] If so, it is remarkable that the party in breach should automatically lose the benefit of an exclusion clause contained in the contract on which the plaintiff himself relies. The notion that the contract-breaker ought to lose the protection of such a clause, apparently as a penalty for his wrongdoing, may be traced to a first instance judgment of Devlin J. in 1951.[6] Devlin J. relied on *Hain Steamship Co.* v. *Tate & Lyle Ltd.*[7] in which Lord Atkin remarked that once a party "elects to treat the contract as at an end, he is not bound by the promise to pay any more than by his other promises." Quite apart from the fact that exclusion clauses are not necessarily "promises," the opinion of Lord Atkin was delivered *obiter* because the contract in the *Hain* case had been affirmed. To hold that an exclusion clause can never apply, after the termination of a contract, to events occurring before that termination, is to read far too much into this dictum.[8] The conceit is perhaps derived from the fallacy which logicians call the denial of the antecedent. If affirmation of a contract is an affirmation of all its terms—which is admitted—it does not follow that disaffirmation dissolves all the terms retrospectively, as if the contract had never been made. The fallacious "doctrine" was supported in *Harbutt's Plasticine* by some *obiter dicta* of Lords Reid and Upjohn in *Suisse Atlantique Société d'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale.*[9] According to Lord Upjohn the point had been conceded [10]; but since this was another case of affirmation it was not necessary to the decision. It is clear from the context that Lord Reid was not delivering a fully considered opinion on this unargued point, but merely preparing the way for its apparent converse.

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[3] See G. C. Cheshire and C. H. S. Fifoot, *Law of Contract* (1969 ed.), p. 585.

[4] *e.g. Giles* v. *Edwards* (1797) 7 T.R. 181; *Planché* v. *Colburn* (1831) 8 Bing. 14; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.

[5] [1970] 1 All E.R. at p. 233.

[6] *Alexander* v. *Railway Executive* [1951] 2 K.B. 882. The judgment was delivered extempore and the learned judge said the law had not been fully explored in argument (p. 888). But Lord Devlin repeated the theory in [1966] Camb.L.J. at p. 201, where he admitted it was "harsh" and opined that it had some connection with the strict liability of common carriers. No authority is there cited.

[7] [1936] 2 All E.R. 597.

[8] The editors of *Chitty on Contracts* (1968 ed.), ss. 738, 742, accept this rule but confine it to charterparties. Yet the cases cited were all decided on questions of construction; see especially *Glynn* v. *Margetson & Co.* [1893] A.C. 351. It may be, of course, that the construction of charterparties is so technical that the parties may be subjected to rules of law on the assumption that, by adhering to well-known forms, they intended them to apply.

[9] [1967] 1 A.C. 361, 398, 419.

[10] *Ibid.* at p. 419. See also 373E, *arguendo*.

It is noteworthy that although the fallacious doctrine was vital to the decision in *Harbutt's Plasticine* once more it passed without dispute.[11] Lord Denning M.R., after quoting Lords Reid and Upjohn, explained: "When their lordships said the contract 'is at an end,' they meant, of course, for the future. Such an ending disentitles the guilty party from relying on an exclusion clause in respect of the breach." [12] It is evident from the juxtaposition of these two sentences that the learned Master of the Rolls does not accept the principles laid down in *Suisse Atlantique*. By imposing a penal rule of law on the "guilty" party, the court were, it is suggested with the greatest respect, repudiating the policy laid down by all five Law Lords in the latter case.[13] Lord Reid himself stated the view of the House with unambiguous clarity: "Among the reasons given in the earlier cases I do not find any reliance on any rule of law that a party guilty of a breach going to the root of a contract can never rely on clauses excluding his liability. . . . In my view no such rule ought to be adopted." [14] Moreover, if the Court of Appeal were correct, the question to be answered is not whether the breach was "fundamental" but whether it actually resulted in the termination of the contract. Their lordships' concern to decide whether the Wayne Tank Co. had committed a "fundamental breach" is therefore difficult to understand.

The particular point in *Harbutt's Plasticine* is best approached by considering first the effect of a termination by election to disaffirm. In the interval between breach and election the contract continues in force; it may even be frustrated by an unconnected disaster.[15] If the contract continues in force so must its clauses, unless there is some rule of law which unilaterally destroys those clauses which benefit the guilty party. Devlin J. recognised such a rule of law, and even thought that the benefit of an exclusion clause was lost *before* the innocent party made his election.[16] This view cannot stand since *Suisse Atlantique*. Neither can the argument that the election, when it is made, has a retrospective effect. Such a legal fiction would impose on the parties a rule for which they had not stipulated.[17] There is a strong analogy in the law relating to arbitration clauses. It is indisputable that an arbitration clause is not destroyed by an election to terminate the contract for breach, because the agreement of the parties to submit themselves to an award is only nullified if the contract be void *ab initio*.[18] Suppose an arbitration clause were to limit the amount of damages the arbitrators could award, in a manner favourable to the party who later commits a fundamental breach: would a different rule then apply?

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[11] [1970] 1 All E.R. at p. 238, *per* Widgery L.J.

[12] *Ibid.* at p. 234.

[13] [1967] 1 A.C. 361, 392 (Viscount Dilhorne), 400 (Lord Reid), 410 (Lord Hodson), 425–427 (Lord Upjohn) and 432 (Lord Wilberforce).

[14] *Ibid.* at pp. 400, 405.

[15] *Avery* v. *Bowden* (1855) 5 E. & B. 714.

[16] *Alexander* v. *Railway Executive* [1951] 2 K.B. at pp. 889–890.

[17] See B. Coote, "The Rise and Fall of Fundamental Breach" (1967) 40 *Australian Law Journal* 336, 345–346.

[18] *Heyman* v. *Darwins Ltd.* [1942] A.C. 356.

The whole contract continues to subsist in the interval between breach and disaffirmation, and that interval may be of varying length. In *Harbutt's Plasticine* there was no interval at all, because the right to disaffirm coincided with the frustration of the contract, and so the law dispensed with the need for an election. There is no good reason why this factor should affect the legal position, and it was not argued that it did. Since an instant is not a period of time, but a point at which the end of one time joins the beginning of the following time,[19] a sequence may sometimes be given to simultaneous events for artificial legal purposes. The cause must take legal priority of its effect, even if the effect and its cause are synchronistic.[20] Thus an exclusion clause, like any other clause, must apply at the moment of breach even if the contract ends *eodem instanti* that it is broken, because the termination is the consequence of the breach and not vice versa.

The relevant time for the purpose of determining the applicability of a clause must be the time when the cause of action, if any, accrued, and not when the action was brought or the defence pleaded. The only case, then, where the party in breach would be precluded from relying on terms in the contract would be where the cause of action accrued *after* the termination of the contract in which the terms were contained. This might be so if the plaintiff sued in tort for damages suffered after the contract came to an end,[21] or sued on a collateral or constructive contract which continued in being notwithstanding the determination of the main contract.[22] These exceptions do not weaken the general rule. To allow the defendant to set up an exclusion clause in a contract freely entered into is not to allow him to take advantage of his own wrong, but to claim his rights under the contract which the plaintiff sets up in his statement of claim.

The only common law test of the validity or scope of an exclusion or limitation clause ought to be the intention of the parties as expressed in their contract. If the parties make the clause apply, then it must do so. The courts will not rearrange contractual rights and obligations to make them more reasonable, for to do so would restrict the supposed freedom of the parties to make their bargains in their own terms.[23] Whether this is satisfactory in all situations is another question—perhaps a question for the legislature.

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[19] Plo.Comm. 110, 258; Co.Litt. 185.

[20] See *Littleton*, s. 287; *Hales* v. *Petit* (1562) Pl. 257, 258, 262; *Fitzwilliam's Case* (1604) 6 Rep. 32; *Viner's Abridgment*, tit. "Instant."

[21] Is this an explanation of *Harbutt's Plasticine*? It appears from the reports that the court did not consider whether the cause of action was contractual or tortious.

[22] *Cf. Davis* v. *Garrett* (1830) 6 Bing. 716.

[23] See [1967] 1 A.C. at p. 392, *per* Viscount Dilhorne.

The main recent cases on the subject might all have been decided purely by construction. In *Suisse Atlantique* the contract allowed the charterer to stay in port and pay demurrage if he wanted to; and even if it did not, so that he was in breach, it was thought that the demurrage clause was not a limitation of liability clause but an agreed damages clause which might have benefited either party. In *Mendelssohn* v. *Normand*[24] the limitation clause, in so far as it applied to the facts of the case, made no grammatical sense. Lord Denning, unexpectedly, added a word *in favorem proferentis*; yet the court held, by construing the contract, that it did not avail the defendant. The limitation clause relied on in *Harbutt's Plasticine* was of uncertain scope, and according to Lord Denning M.R. ought to have been taken *contra proferentem.*[25]

The facts of these cases suggest that the problems of construing clauses in contracts are of greater practical importance than the sophisticated jurisprudence of "fundamental breach." Every type of contract, indeed every type of clause, raises individual problems which cannot be resolved by broad general rules of law.[26] The "doctrine" of fundamental breach, as an attempt to control exclusion clauses by judicial legislation, has been exterminated in its infancy, and its youthful demise is no occasion for mourning. Would it were left to rest in peace.

J. H. BAKER.

THE FRAGILE GLASSWARE RULE OR HOW TO TAKE A RISK

THE plaintiffs, Vacwell Engineering Ltd., used ampoules of boron tribromide supplied by the defendants, B.D.H. Chemicals Ltd., in the manufacture of transistors. The ampoules bore the warning "Harmful Vapour" on labels which were removed by washing, during the course of which one was dropped. The chemical thus came into contact with water, reacted extremely violently and caused damage to the plant and premises of £74,689, which was the subject of this action.[1]

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[24] [1969] 2 All E.R. 1215. *Cf. Adams* v. *Richardson and Starling Ltd.*, *ibid.* at p. 1221; [1969] 1 W.L.R. 1645, in which fundamental breach was not discussed.

[25] [1970] 1 All E.R. at p. 288. See further on this aspect of the case, R. A. Barrett, "Destructive Construction" (1970) 2 *Kingston Law Review* 78–81.

[26] *Cf.* [1967] 1 A.C. at pp. 410 (Lord Hodson) and 432, 434 (Lord Wilberforce); Coote, *op. cit.*, 40 *Australian Law Journal* at pp. 343–344. See also note 8, *supra*.

[1] *Vacwell Engineering Co. Ltd.* v. *B.D.H. Chemicals Ltd.* [1969] 3 All E.R. 1681. There was also an undiscussed claim of £300,000 for loss of profit and one man was killed, who would probably not be assisted by the Employer's Liability (Defective Equipment) Act 1969, as wrongly labelled ampoules would not be "equipment" within s. 1 (3). B.D.H. appealed and, after seven days' argument in the Court of Appeal, the matter was settled on the basis that Rees J. was correct on remoteness in tort although not necessarily in contract. There was however a 20 per cent. reduction in damages representing the defendants' chances of establishing contributory negligence. Lord Denning M.R., in

It was established that there was a foreseeable risk not only of a harmful vapour but also of explosion on contact with water. The defendants' research was "plainly inadequate"[2]; had they consulted the older reference works in their library they would have been aware of the risk of explosion. It was not doubted that the manner in which the damage was caused was foreseeable; the defendants relied instead on the fact that the damage was of an unforeseeable extent.[3]

Since *The Wagon Mound* (*No.* 1) "the essential factor in determining liability (has been) whether the damage is of *such a kind* as the reasonable man would have foreseen."[4] The emphasis is on foresight of a particular kind of risk, not simply on the extent of damage, but with the survival of the thin-skull rule[5] the desire to compensate accident victims has overriden the notion of fairness to defendants, or liability only for morally blameworthy conduct,[6] on which the risk principle seemed to be based. Personal injuries are within one broad risk[7] even though this liability for injuries of an unforeseeable extent is virtually strict. The needs of accident victims are more impressive than conceptual logic.[8]

In this case, the plaintiffs claimed in contract for breach of the condition of fitness for the purpose implied by section 14 (1) of the Sale of Goods Act 1893[9] and of a term that goods supplied be free from hidden defects, implied from the previous dealings between the parties,[10] and in the tort of negligence. Rees J. had little hesitation in applying the thin-skull rule to property damage, relying simply on a tort case on personal injuries.[11] "It would also be foreseeable that some damage to property might result. In my judgment the explosion and the type of damage being foreseeable, it matters not in law that the magnitude of the former and the extent of the latter were not."[12]

Authority on the application of the thin-skull rule beyond per-

approving the settlement, said that the result was almost the same as that at which the court would have arrived if the cause had been fully argued: *The Times*, May 11, 1970. The terms of this settlement included the claim for loss of profits.

[2] *Ibid.* at p. 1690E.

[3] *Ibid.* at p. 1695B.

[4] *Overseas Tankship* (*U.K.*) *Ltd.* v. *Morts Dock & Engineering Co. Ltd.* [1961] 1 All E.R. 404 (P.C.), *per* Viscount Simonds, at p. 415H (italics added).

[5] *e.g. Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405.

[6] *The Wagon Mound* (*No.* 1) at p. 415I.

[7] Nervous shock is however a separate risk; *Chadwick* v. *British Transport Commission* [1967] 2 All E.R. 945, 951B.

[8] In his article "The Risk Principle" (1961) 77 L.Q.R. 179, Dr. Glanville Williams regards the thin-skull rule as logically irreconcilable with *The Wagon Mound* for it "perpetuates the distinction between the question of initial negligence and the question of extent of liability" (at p. 195).

[9] [1969] 3 All E.R. at p. 1694.

[10] *Ibid. at* p. 1697H.

[11] *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 405.

[12] [1969] 3 All E.R. at p. 1699A.

sonal injuries and consequential loss of earnings [13] is sparse.[14] It is regrettable that a court, unencumbered by authority, should not weigh the merits of the issue. Dr. Glanville Williams's limited justification of the thin-skull rule that " human bodies are too fragile and life too precious to permit a defendant nicely to calculate how much injury he may inflict without causing more serious injury " [15] cannot apply automatically when it is glassware that is fragile. Nevertheless the case emphasises that the primary remoteness question is not the extent of damage but the kind of damage and can be reconciled with the risk principle if viewed in this light.

In *The Heron II* [16] there was agreement [17] that damages in tort are wider than in contract.[18] Rees J. drew no such distinction although he considered that case. He was almost certainly right for the differences are more apparent than real. With the imposition of an objective test in contract [19] mention of consensus becomes mere lip service and the idea that the difference is one of degree [20] might rather be expressed by the principle that reasonableness must be assessed in all the circumstances of the case. This is clearly the rule in tort and could be used to take account of the peculiarities of particular contractual transactions in a similar manner to that in which it now takes account of exclusions [21] and the plaintiff's consent to run a risk.[22] Anyway most of the problems arise with matters beyond the actual contemplation of the parties.

Contractual liability arising from section 14 (1) is strict [23] once the term has been implied; the risk principle nevertheless affects the implication of the term.[24] In *Vacwell* there were two risks; that of an accident due to the industrial misapplication of boron tribromide [25] and that of an explosion caused by the defendants' failure to warn of the hazards on contact with water.[26] The former was Vacwell's; had there been such an accident they would have been the cause, for B.D.H. could expect them to understand the elementary chemistry of its application.[27] In respect of the latter, the plaintiffs could rely on B.D.H.'s skill and judgment as chemicals were normally supplied with labels warning of incidental hazards and especially because the boron tribromide carried a warning of the lesser hazard of a harmful vapour. Similar criteria were involved in the implication of a term that "the goods would be supplied with a warning of a major hazard which might arise in the ordinary course of industrial user." [28]

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[13] Or dependency; *Pigney* v. *Pointer's Transport Services Ltd.* [1957] 2 All E.R. 807.

[14] *Great Lakes S.S. Co.* v. *Maple Leaf Milling Co.* (1924) 41 T.L.R. 21 (P.C.) has been thought to provide an example; but in that case the risk was of damage by grounding and the extent of the damage was aggravated not by some weakness in the plaintiffs' ship but because of a submerged anchor. The damage occurred in a broadly foreseeable manner, by grounding. In *The Arpad* [1934] P. 189, the C.A. refused to take notice of a sub-contract in assessing damages for non-delivery; but Scrutton L.J.'s dissent in that case seems to be the more influential view; see Lord Morris in *Koufos* v. *C. Czarnikow Ltd.* [1967] 3 All E.R. 686, (H.L.) at p. 705F. If Mr. Millner's argument that there is little significant difference between nuisance and negligence (*Negligence in Modern Law*, pp. 187–190) is accepted, there is authority against the application of the thin-skull rule to property; *Robinson* v. *Kilvert* (1889) 41 Ch.D. 88, *Bridlington Relay Ltd.* v. *Yorkshire Electricity Board* [1965] 1 All E.R. 264.

[15] (1961) 77 L.Q.R. 179, 196.

[16] *Koufos* v. *C. Czarnikow Ltd.* [1967] 3 All E.R. 686 (H.L.).

[17] See Lord Reid at p. 692B, Lord Hodson at p. 708E, Lord Pearce at p. 710B and Lord Upjohn at p. 715I.

[18] But as Mr. Pickering points out [see (1968) 31 M.L.R. 203, 210] *The Heron II* does not deal with the problem of damage of unusual magnitude, but rather with whether loss of market was a foreseeable kind of damage at all, nor was there any damage arising in an unforeseeable manner.

[19] *e.g.* Lord Morris [1967] 3 All E.R. at p. 701E.

[20] *Supra*, note 17.

[21] See *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1963] 2 All E.R. 575 (H.L.), *e.g. per* Lord Reid at p. 586F.

[22] see *Buckpitt* v. *Oates* [1968] 1 All E.R. 1145, *per* John Stevenson J., at p. 1149C.

[23] *Frost* v. *Aylesbury Dairy Co. Ltd.* [1905] 1 K.B. 608 and see also *Henry Kendall etc.* v. *William Lillico etc.* [1968] 2 All E.R. 444 (H.L.), *per* Lord Reid, at p. 447F.

The problem of classifying risks remains, entangled with operative cause.[29] In *Vacwell* the risk was one of damage to property, which occurred in a foreseeable way, the extent alone being unforeseeable. Difficulty arises when the damage occurs in an unforeseeable way.[30] If *The Wagon Mound* (*No.* 1) "overrules" *Re Polemis*,[31] the manner in which the damage occurs must be significant, for in both cases all the damage was to property. In contract too it must be a factor. For instance, in *The Teh Hu* [32] pecuniary damages were the only kind claimed, a part of which was not recoverable as it was attributable to the devaluation of sterling which, in Lord Denning M.R.'s view, the parties did not contemplate [33] but was a risk which, in the opinions of Salmon and Karminski L.JJ.,[34] they undertook. Nor should we shelve the problem by saying that "the precise concatenation of circumstances" need not be envisaged.[35] Too wide an application of that principle would take us right back to *Re Polemis*.

Inevitably the test is not precise; judges are not concerned with what the defendant did foresee but with what he ought to have foreseen. We can only point to factors which are sometimes material. Rees J. except when dealing with section 14 (1), makes little mention of the manner in which the damage occurred, perhaps influenced too much by Lord Reid's words, "This accident was caused by a known source of danger, but caused in a way which could not have been foreseen and in my judgment that affords no defence." [36] This incautious [37] dictum seems irreconcilable with the decision in *Tremain* v. *Pike*, where Payne J. distinguished disease contracted by contact with rat's urine from the effects of a rat bite.[38] In *Vacwell* the problem was nevertheless faced; Rees J. decided that washing the ampoules in large quantities was neither an intervening cause nor contributory negligence.[39] It was broadly foreseeable and the precise manner in which the harm was caused did not separate the risks in this instance.

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[24] In *Henry Kendall etc.* v. *William Lillico etc.* Lord Pearce, at p. 481E, treats reliance as an aspect of remoteness.

[25] [1969] 3 All E.R. at p. 1694B.

[26] *Ibid.* at p. 1694C.

[27] *Ibid.* at p. 1688I.

[28] *Ibid.* at p. 1697H.

[29] *e.g. Tremain* v. *Pike* [1969] 3 All E.R. 1303, *per* Payne J., at p. 1308C.

[30] The word "way" is sometimes used to refer to the type of harm that the plaintiff suffers. *E.g.* Thesiger J. in *S.C.M.* (*United Kingdom*) *Ltd.* v. *W. J. Whittal & Son Ltd.*, *The Times* March 16, 1970.

[31] Re Polemis and Furness, *Withy & Co. Ltd.* [1921] 3 K.B. 560 (C.A.)

[32] [1969] 3 All E.R. 1200.

[33] *Ibid.* at p. 1203G. Lord Denning M.R.'s view seems endorsed by Waller J. in *Northland Aircraft Ltd.* v. *Dennis Ferranti Meters Ltd.*, *The Times*, February 12, 1970.

[34] [1969] 3 All E.R. at p. 1208F and p. 1212C.

[35] *Hughes* v. *Lord Advocate* [1963] 1 All E.R. 705 (H.L.), *per* Lord Morris, at p. 712E.

MAX WEAVER.

FORESEEABLE ACT AS NOVUS ACTUS INTERVENIENS

IN two recent cases the courts have considered the problem posed when the victim of a tort suffers further injury which would not have occurred but for the disability resulting from the tort. In what circumstances will the tortfeasor be able to invoke the concept of *novus actus interveniens* so as to avoid liability for the subsequent injuries?

In *Wieland* v. *Cyril Lord Carpets Ltd.*,[1] the plaintiff injured her neck as a result of the defendants' negligence, and was compelled to wear an orthopaedic collar. The position of her neck in the collar deprived the plaintiff of her usual ability to adjust herself automatically to the bi-focal spectacles which she had worn for ten years. Shortly after the collar was fitted, the plaintiff fell when descending a staircase and injured her ankles. Eveleigh J. found that the plaintiff fell "because she did not show her habitual skill in descending the stairs when wearing bi-focal glasses. I think that it is well known that it does take some time for a person to become accustomed to wearing bi-focal lenses. Certainly anyone who has worn them will know the difficulty there is in stepping up onto a pavement or in descending stairs. This is a difficulty that is gradually overcome until it is one which is virtually forgotten or so it had been in the case of the plaintiff. Now, however, she was unable, because of the position of her neck, to adjust her sight readily through the appropriate position of the lenses and she was suddenly thrown off balance as she descended the stairs."[2]

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[36] *Ibid.* at p. 708C.

[37] To ignore the manner in which the harm occurred is more acceptable when the action is for breach of the absolute duty to fence imposed by s. 14 (1) Factories Act 1961 for neither the question of moral blameworthiness nor the "intention of the parties" is at stake in determining fault. See *Millard* v. *Serck Tubes Ltd.* [1969] 1 All E.R. 598, *per* Danckwerts L.J. at p. 599D and Fenton Atkinson L.J., at p. 600G.

[38] *Supra* note 29. See also *Doughty* v. *Turner Manufacturing Co. Ltd.* [1964] 1 All E.R. 98 (C.A.).

[39] [1969] 3 All E.R. at p. 1699E.

[1] [1969] 3 All E.R. 1006.

The defendants denied liability for the injuries resulting from the fall, on the ground that it was not caused by their negligence or alternatively, that it was not foreseeable. In a reserved judgment which touches on several interesting aspects of the law of negligence Eveleigh J. rejected both these contentions. As to the first, "it has long been recognised that injury sustained in one accident may be the cause of a subsequent injury. The injury sustained by accident victims on the operating table is an example of that situation. So too are cases of suicide resulting from a mental condition produced by an accident."[3] In so far as the plaintiff's ability to negotiate stairs was impaired by the defendants' negligence, the fall was caused by that negligence.

The plea that the fall was unforeseeable was also rejected. Eveleigh J. was content to treat the case as an example of the egg-shell skull rule, for "it is perfectly permissible in the present case to say that it is no answer to (the plaintiff's) claim for damages that she would not have suffered had she not had eyesight that required her to wear bi-focal lenses."[4] But an alternative ground was simply that the fall was foreseeable: "it can be said that it is foreseeable that one injury may affect a person's ability to cope with the vicissitudes of life and thereby be a cause of another injury and if foreseeability is required, that is to say, if foreseeability is the right word in this context, foreseeability of this general nature will, in my view, suffice."[5]

The result was that the defendants were liable both for the original injuries and for those sustained in the fall. The decision can be seen as a satisfactory and clear illustration of the proposition that since *The Wagon Mound (No. 1)*[6] the *novus actus interveniens* is but an aspect of the general problem of remoteness of damage and will break the chain of causation only if it is not a reasonably foreseeable event.

A different approach was, however, evinced by the House of Lords in *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.*[7] There the plaintiff suffered an industrial accident for which the defendants were responsible. Although his injuries were trivial, his left leg gave way under him on several occasions after the accident. Some days after the accident the plaintiff was very seriously injured when he fell while seeking to descend a steep staircase following an inspection of a flat he had been offered. There was no handrail, and although his wife and brother-in-law were with him, the plaintiff went to descend the stairs ahead of them accompanied only by his small daughter. His leg suddenly gave way. He threw the child back and instead of falling he made to jump in an effort to save himself. The result was that he landed some twelve feet below and fractured his ankle and heel.

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[2] *Ibid.* at p. 1008.

[3] *Ibid.* at p. 1009.

[4] *Ibid.* at p. 1010.

[5] *Ibid.* at pp. 1010–1011.

[6] [1961] A.C. 388; [1961] 1 All E.R. 404.

[7] [1969] 3 All E.R. 1621.

The House of Lords [8] held that the defendants were not liable for the second injury. Lord Reid agreed that a defendant would not be liable for a consequence of a kind which was not foreseeable. But otherwise foreseeability did not govern; the relevant factor was the reasonableness of the plaintiff's conduct; "It does not follow that (the defenders are) liable for every consequence which a reasonable man could foresee. What can be foreseen depends almost entirely on the facts of the case, and it is often easy to foresee unreasonable conduct or some other *novus actus interveniens* as being quite likely. But that does not mean that the defender must pay for damage caused by the *novus actus*. It only leads to trouble that (*sic*) if one tries to graft on to the concept of foreseeability some rule of law to the effect that a wrongdoer is not bound to foresee something which he could readily foresee as quite likely to happen. For it is not at all unlikely or unforeseeable that an active man who has suffered such a disability will take some quite unreasonable risk. But if he does he cannot hold the defender liable for the consequences."

Lord Reid reached that conclusion without citing any authority. It is submitted that the apprehended distortion of the foreseeability test and the gloss on that test introduced in its stead by Lord Reid are equally unnecessary, for the problem could readily be dealt with by applying the concept of contributory negligence. To say that the plaintiff took an unreasonable risk is but another way of imputing negligent conduct to him. There is no reason why the Law Reform (Contributory Negligence) Act 1945 should not be invoked in such a case so as to enable liability for the injuries subsequently incurred to be apportioned between the parties "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." [9] The greater flexibility of this approach commends itself as more likely to achieve justice between the parties and would permit treatment of the problem within the existing framework of legal concepts.[10]

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[8] Lord Reid, Lord Hodson, Lord Guest, Viscount Dilhorne and Lord Upjohn.

[9] S. 1 (1), which applies "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons . . . ," and which expressly provides that "a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage. . . ."

[10] Support for the view expressed in this paragraph may now be found in the judgment of Brandon J. in *The Calliope, Owners of Swedish motor ship Carsholm* v. *Owners of Liberian Steamship Calliope* [1970] 1 All E.R. 624: ". . . it is open to the court, as a matter of law, in a case like the present, to find that the alleged consequential damage was caused partly by the original casualty, and partly by the claimant's own intervening negligence, and to make a further or sub-apportionment accordingly." ([1970] 1 All E.R. at p. 640.) The case was decided under the Maritime Conventions Act 1911, but Brandon J. considered his views to be applicable to the Law Reform (Contributory Negligence) Act 1945 (p. 639)

But in any event it may be asked whether the plaintiff's conduct in *McKew's* case was so unreasonable as to justify the decision that he should be denied compensation. To attempt to descend a staircase unassisted is not, it is submitted, an act of manifest rashness in the absence of evidence that it is done in defiance of medical advice. No such evidence was referred to by the House of Lords. And if the plaintiff's act of descending a staircase without support was unreasonable, what of the accident victim who commits suicide while sane but in a fit of post-accident depression? The " unreasonableness " and the then felonious nature of that act did not deter Pilcher J. from holding the defendants liable for the death in *Pigney* v. *Pointers Transport Services Ltd.*[11] That case cannot now be accepted without comment, for Pilcher J. based his decision on *Re Polemis*[12] and expressly found that the suicide could not reasonably have been foreseen by the defendants.[13] It is submitted that the result is nevertheless correct and represents the modern law. Eveleigh J. was clearly of that opinion in *Wieland* v. *Cyril Lord Carpets Ltd.*[14] It is likely that *McKew's* case will cause considerable difficulty in an area in which it was thought that the law was reasonably settled. As it is, problems of remoteness of damage in tort may have to be governed not only by the relatively simple test of foreseeability, but also by the discrete criterion of reasonableness, at least where the remoteness problem arises out of some act of the plaintiff himself. The courts may have to wrestle with the perplexing thought that an act which is reasonably foreseeable may yet be an unreasonable act; in which case it will operate as a *novus actus interveniens* and break the chain of causation between the defendant's negligence and the ultimate damage. The approach adopted by Eveleigh J. in *Wieland's* case is, with respect, preferable to this difficult concept, and it is to be regretted that the House of Lords did not have that judgment before them in *McKew's* case.

D. B. Casson.

Fair Terms and the Scope of Registrable Restrictive Agreements

In January 1968 the publishers of the *Daily Mirror* increased its recommended retail price from 4d. to 5d. At the same time they cut their percentage discount to wholesalers with the result that the margin to retailers was reduced from 28 to 27½ per cent. Consequently in March the retailers' Federation instructed its members to boycott the *Daily Mirror* for a week. The publishers responded by applying for an injunction restraining the Federation, which was granted and the boycott did not take place.[1] Nonetheless the Registrar of Restrictive Trading Agreements referred the boycott to the court[2] despite its demise[3] as he desired to have it declared contrary to the public interest so that he could get an order or undertaking prohibiting the Federation from making recommendations of a similar sort in the future.[4] The Federation were anxious not to be so tied; accordingly they argued that the restrictions on trading embodied in the boycott were justified under section 21 (1) (*d*)[5] of the Restrictive Trade Practices Act 1956 because they were reasonably necessary to enable the parties to negotiate fair terms for the *Daily Mirror* with its publishers, the International Printing Corporation (IPC), whom they alleged controlled a preponderant part of the trade or business of supplying certain categories of newspapers. Their contentions were unsuccessful.[6] The court said that it was not satisfied that the new trade terms were unfair to retail newsagents[7]; under them the latter now received a larger absolute margin even if it was lower as a percentage of the retail price. In any event the IPC did not control a preponderant part of the trade or business of supplying either national dailies or national dailies, national Sunday newspapers and provincial morning dailies taken together, which were the categories of goods in respect of which the respondents sought to establish the IPC's preponderance.[8] It accounted for approximately 40 per cent. of sales in each of these categories and its sales far exceeded the next largest competitor. However this numerical superiority was not decisive as the heterogeneity of newspapers meant that " competition is less direct, and mere numerical superiority is less indicative of domination of the market than would be the case in other fields." The evidence did not establish that the IPC was a price leader " to a greater extent than other competitors in that market." Also " while no retail newsagent could successfully remain in business for long without stocking the *Daily Mirror* . . . the same [was] true of all or most of the other national dailies." [9] Accordingly the court held that the IPC was not a preponderant supplier.

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[11] [1957] 1 W.L.R. 1121; [1957] 2 All E.R. 807.

[12] [1921] 3 K.B. 560.

[13] [1957] 1 W.L.R. at p. 1123; [1957] 2 All E.R. at p. 809.

[14] [1969] 3 All E.R. at p. 1009; see also *Farmer* v. *Nash*, *The Times*, December 19, 1968 (report of settlement before Willis J.).

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[1] *Daily Mirror Newspapers Ltd.* v. *Gardner* [1968] 2 Q.B. 762, [1968] 2 All E.R. 163.

[2] *Re National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement* (*No.* 3) [1969] 3 All E.R. 97.

[3] *Cf. Re Newspaper Proprietors' Agreement* (1963) L.R. 4 R.P. 361, for his power to do this.

[4] *Cf.* The Restrictive Trade Practices Act 1956, s. 20 (3), (4) for the exact scope of the order which the court is empowered to make. These subsections are set out in full in note 18 below.

[5] To justify a restriction under s. 21 (1) (*d*) the court must be satisfied "that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person not party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other person, controls a preponderant part of the market for such goods; ".

[6] *Re National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement* (*No.* 3) [1969] 3 All E.R. 97.

[7] *Ibid.* at p. 108.

[8] *Ibid.* at p. 110.

From the judgment it appears that the issue of fair terms was scarcely argued: the only fact the respondents seemed able to call in aid was the refusal of the proprietors of the *Daily Mirror* to negotiate with them on terms.[10] A more relevant line of argument would have been to consider whether the profits to newsagents on the *Daily Mirror* was less than those on goods whose retail price was variable in free competition; if they had been, it could have been argued that the publishers were getting retailers' services below the competitive market rate, which provides a good test of fairness.[11]

The court was certainly correct to reject market shares as a conclusive test of preponderance.[12] Market power must be the relevant factor. However it is respectfully submitted that the court should not have considered a comparison between the market power of IPC and that of other newspaper publishers crucial; it is power *vis-à-vis* buyers which matters. Moreover it is surprising that the differences in newspapers should be regarded as diminishing market power for product differentiation has long been recognised by economists as the most common source of market power.[13] Indeed, the differentiation of the *Daily Mirror* from the point of view of consumers was such that the respondents might fairly have claimed that it should have been taken as a separate good for the purposes of assessing its publisher's preponderance, notwithstanding earlier decisions that one juvenile magazine and one category of stranded ropes could not be segregated for this end.[14] In this instance it certainly appears that there was an imbalance of market power with many small retail newsagents facing a few large publishers whose products had an assured consumer market: a combination of newsagents would have rectified this and so helped to ensure that terms did not become oppressive in the future.

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[9] *Ibid.*

[10] *Ibid.*, at p. 106.

[11] ". . . But we think that a suitable initial approach, in the present case, is to apply the test; Are the prices which the buyers would have had to pay, in the absence of the restriction, likely to be substantially higher than the prices which they would have had to pay in market conditions which are similar, except that there is no one supplier controlling a preponderant part of the trade or business? If so, the terms may not be fair terms": *Re National Sulphuric Acid Associations Agreement* (1963) L.R. 4 R.P. 169, 228. For an intimation that "fair terms" are those which exist in workable competition, *i.e.* where there are a reasonable number of sellers, a reasonable number of buyers, no restrictions on either side of the market, see *Re Mining Rope Association's Agreement.* (1964) L.R. 5 R.P. 146, 206.

[12] In some previous cases it had been indicated that a trader must usually control over 50 per cent. of the relevant market to be held preponderant. See *Re Water-Tube Boilermakers' Agreement* (1959) L.R. 1 R.P. 285, 339. *Re Mining Rope Association's Agreement.* (1964) L.R. 5 R.P. 146, 206.

[13] See E. H. Chamberlain; *Monopolistic Competition*, 1926. Joan Robinson, *The Economics of Imperfect Competition*, 1933.

[14] *Re National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement* (1966) L.R. 5 R.P. 236; *Re Mining Rope Association's Agreement* (1964) L.R. 5 R.P. 146. This last point is argued at more length by Mrs. V. Korah [1968] J.B.L. 346.

Another feature of the judgment on paragraph (*d*) deserves mention. The court retreated from the position taken up by Russell L.J. in *Daily Mirror* v. *Gardner*[15] *per incuriam* section 21 (2)[16] that the Daily Mirror Ltd. could not be considered in conjunction with the IPC (which then also published *The Sun*), of which it was a subsidiary, in deciding its preponderance.

It would be regrettable if, as a result of the decision in this case, potential respondents were to form the view that they had no chance of succeeding under section 21 (1) (*d*) whatever the circumstances of their case. Paragraph (*d*) is obviously designed to afford protection for " the small man " by enabling him to combine with others to negotiate fair terms with powerful traders. In conception this ground of justification for restrictions differs from most of the others embodied in the restrictive practices legislation[17] in that it enshrines fairness between contracting parties rather than benefit to consumers or the economy generally as the relevant factor. Heretofore it has generally been considered against a factual background where a restriction has been operative and it has been difficult to show that terms would be unfair in the necessarily hypothetical conditions of free competition. It was reasonable to assume that respondents would be more successful where they could point to unfair terms which had just *in fact* been imposed in the absence of any restriction. While this decision does not confirm this expectation, it is submitted that any contrary conclusion would be premature in failing to make due allowance for the extraordinary feebleness of the respondent's case on fair terms.

While the Registrar was successful under section 21, he suffered a reverse on another aspect of the case. The respondent Federation had made recommendations to its members on three different occasions to boycott various magazines on which they believed the trade terms were unsatisfactory. The Registrar wanted to get an order from the court which would prevent any such restriction being recommended in the future by the Federation to its members affecting other magazines.[18] For this purpose, he sought to show that there was in existence an implied recommendation—implied from the series of recommendations—that members of the Federation would accept any restrictions suggested by the Federation. However the court rejected this submission. " Successive recommendations or directives of this nature, although made in pursuance of a coherent policy are no more than a manifestation of that policy and do not postulate a rule or even a recommendation that the federation's members must act in accordance with all such recommendations or directives." [19] Moreover section 6 (7) of the Act required that a recommendation should be specific in order to give rise to a registrable agreement.[20] A recommendation to do or not to do something the precise nature of which has not yet been determined or " to do or to abstain from doing something in relation to goods of a class which has not yet been identified could not be described as specific."

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[15] [1968] 2 Q.B. 762.

[16] ". . . and references in this section to any one person include references to any two or more persons being inter-connected bodies corporate . . ."

[17] A restriction may be justified under the Restrictive Trade Practices Act 1956 if (a) it protects the public against injury, (b) it confers a benefit on purchasers, consumers or users of any goods, (c) it enables parties to counteract measures taken by another to restrict competition, (d) it enables parties to negotiate fair terms with a preponderant trader (the gateway relied upon in this case), (e) it prevents unemployment in a particular area, (f) it promotes exports. Under the Restrictive Trade Practices Act 1968 restrictions may also be justified if it is shown that they do not prevent competition to any material degree.

[18] S. 20 (3) provides: "Where any such restrictions are found by the Court to be contrary to the public interest, the agreement shall be void in respect of those

It may be that this issue could have been argued in another way with more success by counsel for the Registrar. Instead of trying to read a specific recommendation out of a series of recommendations he could have submitted that the repeated acceptance of such recommendations by newsagents constituted an agreement between them to accept any recommendations of the Federation containing restrictions within section 6 (1) generally or section 6 (1) (c) in particular.[21] Reliance could have been placed on *Re Mileage*

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restrictions; and without prejudice to the foregoing provision the Court may, upon the application of the Registrar, make such order as appears to the Court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom:

(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions;

(b) from making any other agreement (whether with the same parties or with any other parties) to the like effect."

S. 20 (4) provides: "Where any restrictions accepted under a term implied by virtue of subsection (7) of section 6 of this Act in any agreement for the constitution of a trade association are found by the Court to be contrary to the public interest, the Court may, without prejudice to its powers under the last foregoing subsection, make such order as appears to the Court to be proper for restraining the association or any person acting on its behalf from making any recommendation to which that term would apply." For s. 6 (7) see note 20 below.

[19] [1969] 3 All E.R. 97, 104, 105.

[20] S. 6 (7) provides: "Where specific recommendations (whether express or implied) are made by or on behalf of a trade association to its members or to any class of its members, as to the action to be taken or not taken by them in relation to any particular class of goods or process of manufacture in respect of any matter described in the said subsection (1), this Part of this Act shall apply in relation to the agreement for the constitution of the association notwithstanding any provision to the contrary therein, as if it contained a term by which each such member, and any person represented on the association by any such member, agreed to comply with those recommendations made to them by or on behalf of the association as to the action to be taken by them in relation to the same class of goods or process of manufacture and in respect of the same matter." For s. 6 (1) see note 21.

[21] S. 6 (1) provides: ". . . this part of this Act applies to any agreement between two or more persons carrying on business . . . , being an agreement

Conference Group of Tyre Manufacturers' Conference Ltd.'s Agreement [22] where the court inferred an agreement not to lower prices without informing other sellers when sellers had constantly supplied such information under a permissive scheme to that effect. By continually supplying such information the parties were held to have represented that they would not lower prices without doing so and such mutual promissory representations gave rise to sufficient obligations between the parties to constitute an agreement.[23] On this basis it could be argued that any future recommendations by the Federation amounted to aiding and abetting the members in giving effect to an agreement to the like effect as that prohibited.[24]

Even apart from this last argument it is far from certain that the Federation will now be at liberty to make recommendations for the boycott of other newspapers or periodicals in the future as the Registrar feared. It seems from *Daily Mirror* v. *Gardner* [25] that the courts are prepared to prohibit restrictions before reference to the court if their immediate imposition might cause harm. Thus the situation should not arise where new restrictions can be operated with impunity until they are referred to and considered by the court.

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under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:

(*a*) the prices to be charged, quoted or paid for goods supplied, offered or acquired, . . .

(*b*) the terms or conditions on or subject to which goods are to be supplied or acquired . . .

(*c*) the quantities or descriptions of goods to be produced, supplied or acquired.

. . .

(*e*) the persons or classes of persons to, for or from whom, or the areas or places in or from which, goods are to be supplied or acquired. . . ."

[22] [1966] 1 W.L.R. 1137.

[23] *Cf. Re British Basic Slag's Application* (1963) L.R. 4 R.P. 116. Also Peter G. Whiteman, "The New Judicial Approach to the Restrictive Trade Practices Act 1956" 30 (1969) M.L.R. 398 for an excellent general review of the cases on this topic.

[24] However, note that it has not yet been determined whether two agreements can be said to be "to the like effect" if they relate to different classes of goods. It is noteworthy that Russell L.J. in *Daily Mirror* v. *Gardner* [1968] 2 All E.R. at p. 171 remarked that the restriction relating to the *Daily Mirror* might well have been prohibited under the order arising out of the boycott of a juvenile magazine called *Romeo*, which boycott had been held to operate contrary to the public interest in *Re National Federation of Retail Newsagents', Booksellers' and Stationers' Agreement* (1965) L.R. 5 R.P. 417.

[25] In *Daily Mirror* v. *Gardner* [1968] 2 Q.B. 762 the Court of Appeal upheld an injunction given by Phillimore J. prohibiting the Federation from boycotting the *Daily Mirror*. One ground for the court's decision was that such a boycott constituted an injury to the trade of the publishers by means which were unlawful by virtue of the Restrictive Trade Practices Act 1956. Lord Denning M.R. based his conclusion on the fact that restrictions were deemed contrary to the public interest unless justified under section 21 of that Act. Therefore a boycott was prima facie unlawful and so constituted injury to trade by unlawful means. Russell L.J., on the other hand, emphasised that this particular boycott restriction would inevitably be found to operate contrary to the public interest and so must be regarded as unlawful. These decisions have been criticised on the ground that a restriction does not, on the terms of the Act, become unlawful *until* it is found contrary to the public interest. (See Korah [1968] J.B.L. 345: Guest and Hoffman, 84 L.Q.R. 310.)

Yet a restriction which has not immediate drastic effects or which appears likely to be justified may be allowed to operate pending a full hearing; this imports a desirable flexibility which would not be present if the original restriction was interpreted more broadly and a wider range of future restrictions consequently prohibited. Once more the Court of Appeal has admirably supplemented the Legislature's intentions in the light of the requirements of convenience.

CHARLES EDWARD LYSAGHT.

AN ACCIDENT ON THE VICTORIA TUBE LINE

THE decision of O'Connor J. in *Bunker* v. *Charles Brand & Son Ltd.*[1] is important, because it contains two points of contemporary interest, namely the interpretation of statutory regulations, and the effect of the Occupiers' Liability Act[2] upon the liability of an occupier to a visiting workman.

The plaintiff, Mr. Bunker, was a foreman welder employed by an engineering firm, who were maintaining a machine for digging tunnels. The machine was owned by the London Transport Executive, but was let to, and used by, the defendants, the main contractors for constructing a tunnel, forming part of the Victoria tube line. The defendants required a modification to be carried out on the front of the machine, and for this purpose Mr. Bunker was sent to the site at the week-end, when tunnelling work was not in progress. The defendants' site engineer was on duty, and he led the plaintiff to the place at which he had to work, accompanied by two of the defendants' labourers, who were carrying materials to be used on the job. The timber walkway had been removed from the side of the tunnel and to reach the front of the machine, sited as it was in the tunnel, it was necessary to climb over the machine itself, including the rollers at the side of the machine. The usual way of negotiating the rollers on the machine was to walk along the rollers themselves, at the same time holding on to a steel girder. There was some dispute about how the other workers tackled the rollers on this particular occasion, but no doubt that Mr. Bunker (who had previously visited the site and, on the former occasion, safely negotiated the machine) chose to walk crabwise along the angle irons which ran parallel to the rollers, with his shoulders against the tunnel wall, getting support in this way and not relying on the handhold provided by the girder. His foot slipped from the angle irons on to the rollers and he fell, sustaining injuries.

Mr. Bunker's claim for damages for breach of regulation 7 of the Construction (General Provisions) Regulations 1961[3] failed. Regulation 7 requires:

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[1] [1969] 2 W.L.R. 1392.

[2] (1957) 5 & 6 Eliz. 2, c. 31.

[3] S.I. 1961 No. 1580.

> "(1) Sufficient safe means of access and egress shall so far as is reasonably practicable be provided and maintained to and from every place at which any person has at any time to work. . . ."

His Lordship had no doubt that, if the defendants owed any duty to Mr. Bunker under that regulation, they were undoubtedly in breach of it.[4] The duty owed under regulation 7 is set out in regulation 8:

> "(1) It shall be the duty of every contractor, and every employer of workmen, who is undertaking any of the operations or works to which these Regulations apply—(a) to comply with such of the requirements of the following Regulations as affect him or any workman employed by him. . . ."

His Lordship divided the statutory duties laid down in the regulations into two categories, first those under which a duty was owed by the contractor exclusively to his own workmen, and secondly, those under which a duty was owed by the contractor ". . . to all and sundry who might come on to the site in so far as they relate to any work, act or operation performed." [5]

Regulation 7 fell into the first category and imposed a duty on the contractor only in respect of his own workmen; the words ". . . as affect him . . . ," [6] in his Lordship's judgment, did not impose a duty on the contractor to provide for the safety of persons who were not employed by him. This view, his Lordship conceded, was contrary to that of Marshall J. in *Upton* v. *Hipgrave Brothers*.[7] In his Lordship's opinion, however, the words ". . . as affect him . . ." had been inserted in the 1961 Regulations (when they did not appear in the corresponding regulation 4 (1) of the Building (Safety, Health and Welfare) Regulations 1948 [8]) to fill the loophole found in *Herbert* v. *Harold Shaw Ltd.*[9] Those words only served to make it quite clear that where a self-employed man carried on an operation to which the regulations applied, he was bound by them, and liable to prosecution if he failed to comply with them.

The case is a reminder that the primary purpose of statutory regulations relating to industrial safety is to promote safety by providing a criminal sanction, if the regulations are not obeyed, and not to afford a civil remedy to persons who are injured.[10]

Now that there are two conflicting High Court decisions, the extent of the duty, imposed by these particular regulations, must remain uncertain until there is a decision of a higher court. In the meanwhile, the employee of a sub-contractor may sue his own employer to prove that he is a contractor or employer to whom the regulations apply.

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[4] [1969] 2 W.L.R. 1392, 1401.

[5] *Ibid.* at p. 1403.

[6] S.I. 1961 No. 1580, reg. 8 (1) (a).

[7] [1965] 1 W.L.R. 208 (concerning reg. 8 (1) when applied to reg. 48 (1) of the Construction Regulations).

[8] S.I. 1948 No. 1145.

[9] [1959] 2 Q.B. 138.

[10] [1969] 2 W.L.R. 1392, 1404.

The plaintiff did, however, succeed in his contention that the defendants were "occupiers," for the purposes of the Occupiers' Liability Act, of the machine where the accident occurred, and that they owed him the common duty of care under section 2 (1) of the Act, as their visitor.

It was conceded by the defendants that it was convenient to include the rollers within the term "premises" for the purposes of the Occupiers' Liability Act, as the Act defines premises as including ". . . any fixed or moveable structure."[11]

His Lordship had no doubt that the rollers were a danger, and that Mr. Bunker was a lawful visitor to the premises. Moreover, he ruled that the defendants were occupiers of the premises, because it was quite obvious that they remained in control through their responsible officials.[12]

The plaintiff knew the risk, but under the Occupiers' Liability Act, a warning of danger did not necessarily absolve the occupier from liability.[13] It was probable that, formerly, following the decision of the House of Lords in *London Graving Dock Co. Ltd.* v. *Horton*,[14] the present occupier would not have been liable to the plaintiff; he would have been discharged from liability to a visiting worker who ". . . knew and fully appreciated the risk . . ."[15] arising from an unusual danger. Under the Act, however, although no obligation was imposed in respect of risks "willingly" accepted by a visitor,[16] the visitor must now be shown to be "*volens*" as well as "*sciens*." His Lordship did not accept that Mr. Bunker was *volens*, since he was ". . . an employee who is ordered by his own employers and with the knowledge of the defendants to go and work up front of this machine. . . ."[17]

In his Lordship's opinion, the plaintiff had no option but to cross the rollers to reach the place of his employment. The defendants had created this danger by removing the timber walkway, and, to discharge their common duty of care, they ought to have placed planking to provide a sure-footed method of getting to the front of the machine.

Accordingly, the defendants were in breach of their duty to the plaintiff; though, in not using the available handhold, he was himself 50 per cent. to blame.

His Lordship's ruling that the defendants were in control of the machine for the purposes of the Occupiers' Liability Act is of significance. The Act purports to: "... regulate the nature of the duty imposed by law in consequence of a person's *occupation or control* of premises. . . ."[18]

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[11] s. 1 (3) (*a*).
[12] [1969] 2 W.L.R. 1392, 1398.
[13] s. 2 (4).
[14] [1951] A.C. 737.
[15] [1951] A.C. 737, 748 *per* Lord Porter.
[16] Occupiers' Liability Act 1957, s. 2 (5).
[17] [1969] 2 W.L.R. 1392, 1400.

It is becoming increasingly apparent from case law that "occupation" for the purposes of the Act may be divorced from physical presence, and indeed that the Act may give rise to multiple responsibility,[19] where more than one person is exercising, or has the right to exercise, control over the premises.

It now seems clear that *Horton's* case[20] has been safely interred by the Occupiers' Liability Act, and that an independent contractor, like a servant, can no longer be said to accept a risk merely because he continues to work after he has knowledge of it. The decision appears to go some way towards assimilating the duty of the occupier to visiting workmen to the duty of the master to provide a safe system of work for his servants.

BRENDA BARRETT.

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[18] s. 1 (2).

[19] *Wheat* v. *Lacon & Co. Ltd.* [1966] A.C. 552; *Fisher* v. *C.H.T. Ltd.* [1966] 1 All E.R. 88; and *A.M.F. International Ltd.* v. *Magnet Bowling Ltd.* [1968] 2 All E.R. 789

[20] *London Graving Dock Co. Ltd.* v. *Horton* [1951] A.C. 787.

REVIEWS

THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL. By NORVAL MORRIS and GORDON HAWKINS. [Chicago and London: Chicago University Press. 1970. 271 pp. inc. index. 50s.]

As if the title were not provocative enough, the blindfold figure of Justice on the dust-cover is lifting her bandage so that she can peep out with one eye. But this is far from being a one-eyed view of the crime problem. Here are two much-respected and long-established criminologists, Professor Norval Morris of Chicago and Mr. Gordon Hawkins of Sydney universities, marching boldly into this twilit world not merely with both eyes open but operating a searchlight powered by unblinking and (at this late stage) shocking scepticism. In the result, they commit to cold print what criminologists say to each other in low voices in the corridors and smoke rooms at conferences but will repudiate anywhere else; and thereby the book does immense damage to the structure of criminological dogma. On the question of "worsening crime figures," for instance, the authors dare to say that "propositions regarding the 'volume of crime' hardly belong to the realm of significant discourse, for crime is not a unitary phenomenon; it is a label applied to a thousand diversities of behaviour. Their aggregation is a pointless exercise in mixing the immiscible, and quantification only lends a spurious air of precision and clarity to statements which are inherently confused."

They are writing of the American scene, but their observations are universally valid; and those of us who have to do with the annual *Criminal Statistics, England and Wales,* and know what grotesque groupings are therein represented, can but sadly acquiesce. The *Criminal Statistics* will always be misleading, but they could mislead a lot less than they do now; and although in 1967 we had the report of the Perks Committee, a strong committee of mainly statistical experts convened by the Home Office to say how the statistics could be improved, nothing has ever been done about the Perks Report.

Morris and Hawkins think that the criminal justice system is a moral busybody unwisely extended beyond its proper role of protecting persons and property, and enforcing private morality about alcohol, gambling, drugs and sex. The system ought to be getting on with its socially more urgent job of reducing crime and the fear of crime. There is now available to us a fund of information on the subject which, were it acted upon responsibly and steadily, *would* reduce crime and curtail the fear, suffering and unhappiness which it entails. "It is not lack of knowledge, but a failure of political responsibility, that supports our present luxuriant crime rates"; so the book is addressed to the politicians rather than to the criminologists. It is constructive to a degree that is exciting and even daring on all the over-familiar subjects—costs and causes, "victimology," rehabilitating offenders, juvenile delinquency, psychiatric measures, and—particularly—research. (Research at the public expense on "the causes of crime" would be made a crime in itself.) Coming from two criminologists it is so outrageously iconoclastic as to suggest that both of them, having got their book published, were prepared to cut and run. But they are both still in post, having exposed criminologists, everywhere, to an implied comparison with Cato's view of the Roman haruspex, who was paid to foretell the future by disembowelling birds and studying their entrails. "I often wonder," Cato is reported to have said, "how one haruspex can keep from laughing when he sees another." This is a ruthless and funny and delightfully written book which *must* be taken seriously. Its weapon is a beautifully controlled ridicule. It has been inexplicably overlooked by reviewers in this country, where its publication was simultaneous with its American appearance and where all its premises and proposals are totally valid.

C. H. ROLPH.

THE DOCTRINE OF RES JUDICATA. By SPENCER BOWER and TURNER. Second Edition by Sir Alexander Turner. [London: Butterworths. 1969. 455 pp. £7.]

THIS book is not so much a second edition of an old work published forty-five years ago, but rather an entirely new superstructure re-built on sure foundations. As the editor of an established work, Sir Alexander Turner, himself a judge of the Court of Appeal of New Zealand, has resisted the easy role of "bringing it up-to-date" by making obvious emendations and adding the new cases, but with characteristic courage, he has virtually re-cast, re-moulded and re-written the greater part of the former text. He has thus rescued from oblivion a valuable tract into which he has breathed new life, and he has greatly enriched the jurisprudence on this subject. While approaching his task with obvious care, solicitude and even veneration for the original text of Spencer Bower, Sir Alexander Turner has exercised a firm and decisive hand in transforming the character of the old book into a new treatise. He has not only added and analysed all the new English cases, but he has widened the horizon of the subject by drawing on the principal Australian and New Zealand authorities. The result is a fresh, modern, thorough, valuable and authoritative work on a subject of enormous importance both to the theory and the practice of the law.

The doctrine of *res judicata*, which gives its name to the work, raises fundamental questions about the nature of the judicial process and about legal procedure generally. The prevailing theory is that it is founded on two grounds, one of public policy, that there must be an end to all litigation by the final and conclusive effect of judicial decisions (expressed in the maxim *Interest* (*or expedit*) *reipublicae ut sit finis litium*), the other of private justice, that any party in litigation which has been concluded must not be subjected to further vexation by a subsequent suit or prosecution (expressed in the maxim, *nemo debet vexari pro una et eadem causa* or in the case of criminal proceedings, *pro uno et eodem delicto*). Sir Alexander Turner convincingly demonstrates that the development of the law in many classes of cases has undermined the theoretical foundations of estoppel *per rem judicatam* and he observes that such development manifests "some substantial degree of resistance on the part of the Courts against extending the application of the doctrine any further; and indeed may demonstrate a definite tendency towards positively restricting its future operation, in the face of the increasing complexity of many of the problems of modern litigation."

Perhaps indeed the observations of Sir Alexander Turner and the whole tenor and approach of his work may generate a healthy and critical re-appraisal of the basic philosophy underlying the doctrine of *res judicata* and bring it more into line with the needs of modern society. Perhaps for too long we have been prisoners of legal maxims and need to break out to examine afresh the social and juridical basis for the operation of this doctrine. For example, it may be asked whether the concept that public policy requires litigation to be brought to an end, whatever the result, does not conflict with the requirement of public policy that the end of litigation should be a *just* result? Are we satisfied that our procedural system operates so adequately that public policy should prohibit the re-investigation or re-agitation of *all* matters that were resolved between the same parties in the earlier litigation, whatever its subject-matter may have been? Does public policy really countenance the principle that, in the graphic words of Isaacs J. in *Meyers* v. *Casey* (1913) 17 C.L.R. 90, 115, "a competent court or other tribunal has jurisdiction to give a wrong judgment, and if there is no appeal in the strict sense, then its decision, right or wrong must stand, and cannot be questioned in any subsequent proceedings elsewhere"? Should public policy tolerate the danger that a judicial decision relied on as constituting *res judicata* may not only be wrong but contrary to the demonstrable truth and because it is allowed to stand would actually exclude the truth from being placed before the court? Does the resistance of the courts to the further extension of the doctrine of *res judicata* reflect the right trend in social policy, and if so, does the reverse of this trend in the matter of admitting criminal convictions as evidence in civil proceedings, as now provided in sections 11–13 of the Civil Evidence Act 1968, represent a justifiable exception? Is the doctrine of *res judicata* a legal concept of general application for which it is necessary to invoke public policy, or is it the aggregate of particular legal rules applied differently according to the special needs of particular legal and social relations? These are large questions which are lightly touched on but which have yet to be fully examined from the standpoint of the objectives of procedural law, especially when the day comes to codify the rules relating to *res judicata* as part of the law of evidence.

The book treats the subject in the two aspects into which it naturally divides. Part I deals with estoppel *per rem judicatam*, under which a party or his privy is precluded from disputing the correctness of the earlier judicial decision as against any other party thereto or his privy; and Part II deals with the doctrine of merger, under which the original right or cause of action becomes extinguished and merges in the judgment (*transit in rem judicatam*). While thus broadly following the arrangement of the first edition, Sir Alexander Turner has completely reconstituted the text, except that, yielding to a "nostalgic" sense of pleasure, he has retained some of the original passages but adding his own opinion, sometimes to the contrary, in his own way. Throughout Sir Alexander writes in a clear, vivid style, with engaging interest and attractive directness. He analyses the principles and the cases in a helpful and critical fashion, and unobtrusively but with no little authority expresses his own views and preferences which should be of great assistance to practitioners and judges alike.

The value of the work has been greatly enhanced by the fuller exposition of many subjects which were hardly noticed before. Thus the application of *res judicata* to default judgments and to foreign judgments is treated at length and indeed, each of these subjects could well have merited a separate chapter. In relation to default judgments, the close examination of the recent cases, particularly *New Brunswick Rail Co. Ltd.* v. *British and French Trust Corporation Ltd.* [1939] A.C. 1 and *Kok Hoong* v. *Leon Cheong Kweng Mines Ltd.* [1964] A.C. 993 reveals a pronounced division of judicial opinion at the highest level, and leads Sir Alexander to the not very comforting conclusion that "the true principle may receive further clarification" in some future case before the House of Lords. In relation to foreign judgments, Sir Alexander firmly disagrees with Spencer Bower on the essentials to found the jurisdiction of the foreign court, and he affirms that the climate of opinion seems to be changing, since today the courts are no longer ready to recognise, so automatically as a hundred years ago, the validity of *every* foreign judgment *inter partes*. This change of attitude is further explored in the contrast between what has come to be called "cause of action estoppel," *i.e.* estoppel with respect to the cause of action set up in the first proceeding and the developing doctrine of "issue estoppel," as to which Lord Reid said in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853 "there is room for a great deal more thought before we settle the limits of issue estoppel."

Four particular subjects of enormous interest and importance in practice have been singled out for special treatment in separate chapters which are entirely new. These are the application of the doctrine of *res judicata* in running-down cases, in taxation and revenue cases, the plea of *autrefois acquit* and matrimonial proceedings. In relation to running-down cases, Sir Alexander examines the seven English, Australian and New Zealand cases decided at the time of writing and having regard to the extraordinary ferment and division of judicial opinion he concludes "that there can be but few estoppels sustained" in this class of case, a conclusion supported by cases reported since publication. On the other hand, in taxation and rating cases, it has been settled, at any rate since 1926, that the doctrine of *res judicata* has no application, since each decision in regard to one year's tax or rates relates to a different question. The ambit and operation of the plea of *autrefois acquit* are considered in the light of *Connelly* v. *Director of Public Prosecutions* [1964] A.C. 1254, and Sir Alexander valiantly attempts a reconciliation between the views of the majority of the Law Lords who recognised that "issue estoppel" may arise in criminal cases and the view of Lord Devlin who denied this. In relation to matrimonial proceedings, Sir Alexander exhaustively examines the limits of the application of *res judicata*, particularly having regard to the inquisitorial note of the court. He complains that in *Indyka* v. *Indyka* [1967] 2 All E.R. 689, the House of Lords should have laid down some new limits or criteria for the wider recognition to be accorded to foreign decrees, but this does not seem entirely just, for this would have been the exercise of legislative, not judicial, functions. On the other hand, the long-standing decision of the Court of Appeal in *Butler* v. *Butler* [1894] P. 25, under which a decree rescinded on the intervention of the Queen's Proctor is still regarded as operative to found a plea of *res judicata* between the parties, is justly criticised and the conclusion that it was wrongly decided seems unanswerable.

Perhaps the weakest, and certainly the slightest, part of the book is devoted to pleading and practice, which because of their practical importance would have merited much more extended treatment.

In the first edition in 1924 Spencer Bower had expressed the view that a criminal conviction was admissible in civil proceedings as prima facie evidence of guilt. In 1943, in *Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587 the Court of Appeal came to the opposite conclusion. Not surprisingly, therefore, Sir Alexander Turner devotes special attention to this case, and to the Fifteenth Report of the Law Reform Committee in 1967 and sections 11–13 of the Civil Evidence Act 1968 (reproduced in full in the Appendices) which recognise the validity of Spencer Bower's views. It is interesting to observe that, notwithstanding the eminence of the counsel involved in that case (who included on the one side Mr. A. T. Denning K.C. and on the other side Mr. Holroyd Pearce), the first edition was not cited in argument at all, which enabled Goddard L.J. wrongly to invoke the "unanimous opinion" of most modern textbook writers as supporting the conclusion in that case. In the future, in any case in which a problem concerning *res judicata* arises, whether in England, Australia or New Zealand or indeed in any other part of the Commonwealth, it is hardly conceivable that this edition will not be cited, for in its own field it is an indispensable book for practitioners and judges alike.

A few minor errors appear in the text, probably by way of carry-over from the first edition, *e.g.* "K.B.D." should of course be "Q.B.D." (p. 58, note 5); County Courts Act 1934, s. 23 (2), should be County Courts Act 1959, s. 26 (1) (p. 90, note 4); the method of assessment of damages on a writ of inquiry has long since been abolished (p. 184); s. 4 of the Statute of Frauds should of course now be s. 40 of the Law of Property Act 1925 (p. 165). But these blemishes do not detract from the excellence of the work produced in a handsome volume, which may partly account for the price.

I. H. JACOB.

COMPARATIVE JUDICIAL BEHAVIOUR. Edited by GLENDON SCHUBERT and DAVID DANELSKI. [London: Oxford University Press. 1970. xxii and 412 pp. 65s.]

FIRST and foremost this is a book about methods of research into human behaviour, written by political scientists of the American behaviourist school. The legal orientation implied by its title is largely incidental to the main purpose. The judges are popular subjects for this kind of research because they operate in a socially important area of decision-making, because they act in compact groups which are methodologically convenient for study, and because their decisions can be slotted into formal patterns which facilitate comparison. But the market for this book in Britain will inevitably consist more of political scientists than of lawyers.

American behaviourism has never really fired the imagination of social scientists in this country. And, among lawyers, deep-rooted traditions of Austinian positivism (the apotheosis of which is the doctrine of *stare decisis*) have branded empirical studies of the determinants of judicial behaviour as *a priori* irrelevant to an understanding of the English judicial process. By contrast, the long established tradition of American realist jurisprudence—which has numbered many judges and lawyers among its prophets—has fostered in the United States an ever-increasing interest in what judges do and why they do it. There is a degree of empathy between American lawyers and academic social scientists which is sadly lacking here.

The intention underlying this series of studies has been to move away from conventional descriptive area studies, which merely juxtapose factual information about institutions in different countries, towards cross-cultural analyses in which cultural differences are treated as a major variable to explain differing patterns of behaviour. The idea has been to allocate a pair of authors, one American and one a native of the country concerned, to work on each of the countries selected as subjects for study. The resulting series of chapters are arranged "in more or less general accord with a concept of a scale of westernisation of adjudication processes." The book begins with Korea, and proceeds via Japan and the Philippines to India, Canada and Australia.

However, as co-editor Glendon Schubert candidly admits, the plans did not quite work out. One or two indigenous authors dropped out of the project and, in the result, seven of the twelve contributors are Americans. The intention of including chapters on Pakistan was not realised, and there are no indigenous authors producing chapters corresponding to those on the Indian Supreme Court (by Gadbois) and the High Court of Australia (by Schubert himself). Schubert also admits that the overall approach is not quite so cross-cultural as had been hoped. Five of the chapters are single-area studies which apply American behaviourist methodology. Four more draw comparisons with the U.S. Supreme Court. One chapter (by Flango and Schubert) draws potentially interesting comparisons between the Supreme Courts of the Philippines and of Hawaii, but the Hawaiian data does not match the quality of that produced for the Philippines and the end-product is patchy. A chapter by Dator, exploring the use of Eysenck's classical inventory for measuring ideological position along a "conservative-progressive" continuum, is cross-cultural to the extent that it links existing British, German and American data with the author's own work on the higher judiciary in Japan. But, despite obvious misgivings, Schubert feels able to claim that "the thrust of this volume is certainly away from descriptive area studies, and towards the multi-variate causal analyses that facilitate generalisations at the level of abstract theories rather than of discrete facts."

The sequence of studies begins with a disarmingly uncomplicated study of the Korean judicial system by Hahm, but the sophistication of the behaviourist techniques emerges from four subsequent chapters on Japan—

a country which has espoused the behaviourist religion with increasing fervour in recent years. The chapter by Kawashima, "Individualism in Decision-Making in the Supreme Court of Japan," is an ambitious attempt to correlate judicial backgrounds and ideologies with the character of the decisions reached by the court: it is based upon an analysis of the 750 cases decided during the period 1947–62 in which individual judgments were given. Although the conclusions are tentative, the author's primary concern (and this is true of the book as a whole) is to demonstrate the possibilities of the methods used. This is followed by Danelski's fascinating chapter on the workings of the Japanese Supreme Court and the backgrounds and career patterns of the Japanese judges, together with an analysis of non-unanimous decisions of the Grand Bench of the Supreme Court during the period 1950–60 using correlation matrices and an unlikely-sounding technique called "smallest space analysis."

There follows an analysis by Samonte of decisions of the Philippine Supreme Court in terms of judicial backgrounds, replicating Schubert's earlier studies of the U.S. Supreme Court. Then there comes a chapter comparing the Philippine and Hawaiian Supreme Courts, based upon the responses of judges to a hypothetical legal problem. It seems remarkable that such a high proportion—about three-quarters—of the judges contacted were willing to bare their souls to such searching scrutiny: one doubts whether a study of this kind could even get off the ground in this country.

Proceeding further along the imaginary scale of increasing westernisation we come next to an interesting chapter which makes use of scalograms to relate the backgrounds and the decisions of Indian Supreme Court judges. This is followed by two studies of the Supreme Court of Canada, a country which is particularly interesting to British readers because of its strong positivist tradition, backed by a doctrine of *stare decisis*, which (as in Britain) tends to conceal both the individualism of the judges and the policy making role of the courts. By using scalograms, Donald Fouts shows clear divergences in behaviour among the judges in cases involving civil liberties and economic issues. He is also able to show how judges from Quebec stand apart from their brethren in favouring strict regulation of the individual in the interests of society.

All in all, the insights provided by this book are fascinating and the future clearly holds exciting possibilities for the further use of these techniques as tools for judicial research. Much of the book consists of highly technical discussion which will probably be more of interest to the statistician than to the lawyer: and it is all too easy with a work of this kind to be so carried away with admiration for the sheer technical precision of the methods used that one loses sight of the phenomena being studied. But a great deal of fascinating and original information about legal institutions does emerge from these studies. For those who do not swoon at the sight of a scalogram and who are interested in exploring new perspectives in the study of legal institutions this book is good value for money.

GAVIN DREWRY.

HANBURY'S MODERN EQUITY. Ninth Edition by R. H. MAUDSLEY. [London: Stevens. 1969. xcvi and 788 pp. inc. index. £3 10s. Paperback; £6 Hardback.]

A GLANCE at the table of contents of the new *Hanbury* might lead the unwary to suspect that there was little change from the earlier editions, merely some updating. This is not so. *Hanbury* has been transformed and vigorously boosted into the 1970s by Professor Maudsley and his team of assistants. This is most apparent in the almost completely re-written parts on Trusts.

Part 3 on "Trusts and Powers" and Part 4 on "Trustees" run to some 340 pages. They amount to a completely new textbook on the subject. If *Lewin* is a "look it up and what do we do now" book, for the practitioner, then *Hanbury* must clearly be regarded as a "Why it is there and how it works" book for the student. It continually asks why have a trust? What sort of a trust do you want to set up (p. 29)? Why have a protective trust (p. 171)? Why release powers (p. 118)? How can advancements be made, and why (pp. 358 *et seq.*)? What is the purpose of investment, and how should it be carried out (p. 314)? What factors have to be borne in mind when appointing trustees (p. 291)? How and why should a trust be varied (pp. 379 *et seq.*)?

In these two parts, Professor Maudsley has skilfully blended his sound knowledge of technical law, and also his knowledge of the administration of trusts. There is abundant reference to modern relevant authorities, and to modern practices. Undergraduates who so often ask why should they study this subject at all can find their answers in this new edition.

The reviewer is not uncritically enthusiastic about these sections. There are some omissions. The treatment, or lack of it, of capital gains tax is possibly the most startling. This is particularly noticeable in those chapters on advancement, variation and termination. The paralysing effect of the seven-year survival period in these situations could also have been dealt with more fully. These may be considered sordid fiscal details, but they completely alter the picture when variation and termination are discussed. Again, although a minor point, the topic of legal apportionments is referred to in chapter 18 and is meant to be dealt with in chapter 28, but did not appear conspicuously there.

The fragmentary nature of equity, however, makes it impossible for the editor to produce a book which is a unity in itself. In certain parts, the book changes into a different and much lower gear. This is particularly true in the part on administration. It is suggested that neither administration nor equity are so devoid of interest as this section might indicate. There is no section on that very important topic of deeds of family arrangement. They often affect an administration and can cause as much blood to be spilt as ink. But equitable principles clearly have to be borne in mind when such arrangements are negotiated. Again, what of the difficulties that arise when executors want to purchase assets from the estate? The question of trustees purchasing is briefly dealt with in section 2 of Chapter 20 on the "Fiduciary Nature of Trusteeship," but not at all in Administration. Often the executor, or trustee as he may have become, will be the person most interested in purchasing the assets. This problem can arise in a particularly acute form where an ill-drawn will appoints the deceased's co-directors as his executors, and the estate consists largely of shares in the company employing the executors. When commorientes are discussed (p. 458) there is no mention of substitutionary clauses. *Wing* v. *Angrave* (1860) 8 H.L.C. 183 is mentioned, but not the more recent case of *Re Rowland (Deceased)* [1963] Ch. 1. Again, there is nothing on the rights of legatees to interest and income on demonstrative and specific legacies (pp. 460, 461). Not only are beneficiaries acutely interested in their precise income rights, but also the administration of a close company can be affected if a controlling interest is owned. Finally, into this Part, limp Election, Performance and Satisfaction in suitably short chapters.

Part 6 is concerned with "Other equitable interests in land." It includes two lengthy chapters on mortgages and restrictive covenants. There is not the same air of immediacy here as in the section on trusts. Indeed it must be difficult to decide whether these topics should be dealt with meticulously and at length, as they are here, or the reader referred to books on land law. No doubt, whatever an editor decides on this point will be criticised. But this section does contain a particularly outstanding chapter on "Conversion and Trusts for Sale" (Chap. 28). There is a very well managed discussion on the changing nature of the trust for sale, its function and future and a prognosis is made of an early demise for the Settled Land Act settlement. Could this chapter appear earlier, when the holding and management of trust assets is considered?

There seems to be a little overlapping between the initial and the end sections of the book. The last chapters deal with what could be regarded as peripheral equity today. They are lucidly, provocatively and very relevantly written. The contemporary problems of privity, mistake, estoppel, licences and equitable easements are examined, and the difficulties explained. The incoherent nature of equity is exposed. In many ways, these last chapters are more of an introduction to the nature of equity than the historical sections at the beginning. It is not very fruitful to discuss the order of a book, but the reviewer did wonder whether an improvement might be made if the last were not first, and some of the first not at all. Does the historical introduction introduce one to the present, and make it more understandable? Surely, those poor overworked Franciscan Friars in their dormitory (p. 7 and Maitland p. 25) should be finally put to bed? With the existence of sub-trusts and derivative settlements, discussion simply of legal and equitable interests, even if preceded by an historical introduction is not today entirely meaningful. One is more concerned with beneficial interests and their extent on the one hand and nominal ownership on the other, and even this terminology creeps into the historical introduction (p. 29).

The new edition of *Hanbury* is in many ways more than one book. As a new textbook on trusts, it is essential to the student who wants to know more than the bare rules of the subject. Trusts are here treated in context. As a new book on equity, it will be invaluable to both teacher and taught as containing, at a very reasonable price, a relevant and comprehensive statement of the position of equity today. The reviewer does and has with enthusiasm recommended this new edition. It fully lives up to its title.

A. J. HAWKINS.

THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS. By J. E. S. FAWCETT. [London: Oxford University Press, 1969. 368 pp.]

PIERRE-HENRI TEITGEN voiced the feelings of the majority when in the Consultative Assembly of the Council of Europe in August 1949 during the general debate on the motion urging the creation of a European Convention on Human Rights he declared: "This fundamental affirmation is thus inscribed at the very foundation of our union; every man by reason of his origin, his nature and his destiny has certain indefeasible rights against which no reason of state may prevail." The convention which eventually followed was greeted by many of the delegates with expressions of disappointment. This, many felt, was not a Charter of Human Rights for Europe, fit to stand beside the Universal Declaration, the American Declaration of Independence and the French *Déclaration des droits de l'homme*. However, it can now be seen that the authors of the European Convention were not blind to the difficulties which would face their Treaty, difficulties of interpretation, enforcement and, not least, questions of national and regional security. While the Universal Declaration has remained a forlorn milestone on the path of the United Nations, the European Convention, thanks to the longsightedness or diffidence of its framers and the enthusiasm and conscientiousness of the distinguished members of the European Commission and Court, has become an important factor in the law of its Contracting Parties and an obvious source for the eventual emanation of a European Public Law.

Mr. J. E S. Fawcett has been for some years a member of the European Commission of Human Rights and as such is eminently qualified to show how the Convention by dint of the fact that it is applied law stands apart from so many other human rights documents. What he has tried to do in this book, which makes it one of the most important among the many which have appeared during the last few years on the Convention, is to examine the substantive application of the treaty. This he has done by considering each Article in turn, studying the interpretation given by the Commission in its most important decisions and, where relevant, comparing the appropriate *travaux préparatoires* Current interest in the European Convention centres perhaps not so much on the procedures and machinery of enforcement which after twenty years are losing some of their novelty but rather on the actual protection offered by the Convention as it is being laid down in the by now quite extensive *jurisprudence* of the Commission. Any study of the work of the Commission and the Court reveals the tremendous range of public, international and comparative law with which those bodies are concerned. For instance Articles 5 and 6 of the Convention dealing with the rights of liberty and security and to a fair hearing have been the subjects of the largest number of Applications but these, of course, concern the penal and judicial systems of each of the sixteen contracting States (now fifteen since the resignation of Greece). To apply the Convention the Commission must not only have a working knowledge of such matters but also be aware of them in the context of the legal system as a whole of the respondent State and indeed of the political situation pertaining therein as was illustrated in the application against Greece and the 1957 application against Ireland by Gerald Lawless. Similarly in relation to other of the rights such as religious freedom and the right not to be denied education the comparative constitutional lawyer may again find his talents employed. These facets of the Convention's interpretation are well and subtly brought out by the author without repetition or monotony.

A difficult area of interpretation exists with regard to those States where the Convention has become a part of the municipal law either by express incorporation or by self-execution. In several instances, as Fawcett points out, a national court has been called upon to interpret the Convention where the matter has never been before the European Commission. The relationship between an international tribunal such as the European Commission and the municipal courts of civil law countries will probably long be regarded by the United Kingdom lawyer as one of the unrevealed mysteries but Mr. Fawcett, as one would expect, deals with such a topic in a calm shrewd analytical fashion and it is perhaps here that the international lawyer comes into his own.

The book takes the form of a commentary on the Convention and on first inspection this is a little perturbing; the present reviewer was scarcely less troubled in retrospection. The author takes each Article of the Convention from Preamble to Final Clauses, likewise the First Protocol, reprints these in English and French and then proceeds to analyse each Article relevant phrase by relevant phrase. By this approach he has indeed well substantiated his claim that the work is analytical but it is not immediately clear at what type of reader the book is primarily aimed. In several places one senses that Mr. Fawcett is cramped and would have preferred to expand his views at length but was precluded from doing so by the form he had chosen. Again in relation to Articles 5 and 6, one feels that Mr. Fawcett would like to spend more time, perhaps produce some more statistics with regard to the length of detention on remand but that for the sake of the concept of the book as a whole he has been constrained to stay his hand. At the other extreme one often reads through several pages of large-type reprint only to find, to one's disappointment, the Article dismissed in a few lines of commentary in smaller print. This is particularly the case in relation to the final Articles of the Convention and those concerning the procedure of the Commission and Court, and of course Mr. Fawcett has explained in his Preface that it is not his intention to study these parts in detail. They could in fact have been omitted or produced shortly in summary form as an introduction. Both the practitioner and the student will be aware of the procedure of the Commission and Court before reading this book and if not armed with such knowledge will find the first 257 pages hard going.

The book will be used primarily as a reference book and hidden between the reprints is to be found a wealth of observation and learning that make it by far the most impressive book in English to be produced on the substantive rights secured by the European Convention.

The book however forewarns of a new era in human rights publishing. It would seem that the time has come when no book can adequately cover the whole topic of human rights protection in Europe. This book in effect and in declared aim limits itself to analysing the substantive rights in the context of the Convention as a whole and, despite the self-imposed incumbrances of form, it does so in a remarkably concise and perceptive way. What is now needed is a series of further studies of the Convention as applied law. The Convention now has wide application not only in Strasbourg but in a large number of municipal systems and it is submitted that there is a great deal of scope in the translation of works into other languages to encourage the cross-play of legal thought processes which the author of the present book has shown to be essential. A further advantage would be to give non-English speaking European readers the opportunity to enjoy and benefit from Mr. Fawcett's lucid exposition of the Convention's application.

RALPH BEDDARD.

THE VIETNAM WAR AND INTERNATIONAL LAW. (Sponsored by the American Society of International Law.) Volume 2. Edited by RICHARD A. FALK. [Princeton, New Jersey: Princeton University Press. London: Oxford University Press. 1969. ix and 1270 pp. (inc. documents and index). Bound £12. Paperback £8 6s.]

THE first volume of this valuable collection of materials on the legal and political issues surrounding the Vietnam War was reviewed in this *Review*, Vol. 33 (1970), p. 111. The new volume was in fact published in February 1970. It is presented on similar lines to the earlier volume and thus consists of articles and speeches by politicians, lawyers and publicists. There is less room given to the general legal status of American involvement presumably because the question was given much emphasis in the first volume. Substantial sections appear on the laws of war, a topic ignored in the other collection, and the relation of the war to the Constitution. A special section is devoted to "Thoughts on Settlement" and this includes an interesting address by McGeorge Bundy. A considerable number of the papers in the volume at large, among them one from the new American judge on the International Court, deal with the interaction of law and policy. Individual items of special interest or quality might be picked out. Thus the distinguished French jurist Charles Chaumont (p. 127) provides a forthright and bitter critique of American policy which had appeared earlier in the *Revue Belge de Droit International*. Richard Falk (p. 216) contributes an excellent catalogue of the legal and policy considerations and considers their inter-play. Max Gordon (p. 321) examines the historical background with particular reference to the United Nations. William D. Rogers (p. 1027) writes a clear account of the issues raised by the doctrine of intervention as an instrument of policy.

It may be that the most significant items in the volume will prove to be the studies by Lawrence C. Petrowski and Henri Meyrowitz on the actual conduct of the war. Evidence of the type of war pursued by the United States has been available for some years, for example, in the French Press, supplied by reporters with first-hand knowledge. In their articles Petrowski and Meyrowitz refer to the deliberate strategy of devastation and the use of free-fire zones with the object of driving the population into government areas, leaving those outside these to be treated as presumptive military targets. Petrowski quotes (p. 495) the following report by Bernard Fall:

> ". . . Our 'Skyraider' was loaded with 750-pound napalm bombs and 500-pound napalm bombs, plus our four 20-millimeter cannon. Our wing plane carried 7,500 pounds of high explosive antipersonnel bombs plus our four cannon. . . . As we flew over our target it looked to me very much as any normal village would look: on the edge of a river sampans and fish nets in the water. It was a peaceful scene. . . . The napalm was expected to force the people—fearing the heat and burning—out into the open. Then the second plane was to move in with heavy fragmentation bombs to hit whatever—or whomever—had rushed out into the open. Then we came in a third time and raked over the village with our cannon. . . . There were probably between 1,000 and 1,500 people living in the fishing village we attacked. It is difficult to estimate how many were killed. It is equally difficult to estimate if there were actually any Viet Cong in the village, and if so, if any were killed. . . . I read an official report later which described the village as a Communist rest center, and said it had been successfully destroyed."

Those servicemen currently facing courts-martial on murder and kindred charges are the disciples of a certain conception of war, exemplified in both land and air operations.

IAN BROWNLIE.

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN INDIA AND PAKISTAN. By M. A. FAZAL. [Oxford: Clarendon Press. 1969. xxxv and 845 pp. (inc. index). 80s.]

THIS book covers the well-worn theme of judicial control of administrative action. Its interest derives from seeing these familiar concepts in a new setting, that of India and Pakistan. *Plus ça change plus c'est la même chose.* The chapter on jurisdictional review reveals the same chaos in Indian and Pakistani decisions as in English cases, the courts quashing decisions and substituting their judgment when they think the administrative authority has reached a wrong conclusion and vice versa. The author, however, thinks that English courts draw a clear distinction between errors of jurisdiction and errors of law apparent on the face of the record. This is hardly true of cases like *Anisminic Ltd.* v. *Foreign Compensation Commission* and *Ashbridge Investments Ltd.* v. *Minister of Housing and Local Government.* Again, in some cases where there seem to be subtle differences such as a narrower definition of error of law apparent on the face of the record in Indian law, this turns out to be of little practical significance, as this ground of review has been largely superseded by granting review if "on the true interpretation of the statute" the courts arrive at a different conclusion. The Indian and Pakistani courts also adopt the same device as English courts of categorising issues as questions of fact when they do not want to interfere. There are, of course, some substantial differences, especially in the realm of remedies. The immunity of the state from actions for damages is much wider than in English law and the prerogative remedies have largely freed themselves from the technicalities to which they are still subject here.

The author is not afraid to express his own opinion and throughout the book he makes very valuable comparisons with English and American administrative law. His criticisms are always based on a careful and searching analysis of the cases. Thus he shows very convincingly that bias makes a decision void not voidable in spite of the weighty opinions which have been expressed to the contrary. Again he criticises the Indian courts for deciding that the rules of natural justice have to be looked for in the statutory provisions rather than the courts supplying the omission of the legislature. Nevertheless he recommends the intention of the legislature as the test for deciding the applicability of the principles of natural justice to a policy decision. This is a good example of the strength and weakness of this book. It is a very profound critical analysis of the existing law but the solutions it recommends are not very far-reaching or original.

G. GANZ.

MUSLIM LAW. THE PERSONAL LAW OF MUSLIMS IN INDIA AND PAKISTAN. By FAIZ BADRUDDIN TYABJI. Fourth edition by Muhsin Tayyibji. [Bombay: N. M. Tripathi Pte. Ltd. 1968. 1061 pp. Rs.50.00 net. U.K. price £5. Distributed in the United Kingdom by Sweet & Maxwell.]

THE last edition appeared in 1940, and changes have occurred in the constitutional background, the statutory part of Islamic law in the Indian subcontinent, and the climate of opinion. The original author's intention was to state the law in a practical code, adding the necessary citations. Here the changes have led to much rewriting, the exposition of the law of inheritance has been simplified, and sections are renumbered accordingly. The price is reasonable.[1] The proof-reading, unfortunately, was not up to Tripathi's high standard.

The book gives all information needful to establish what the law was *circa* 1968 on the hard-core topics of marriage, divorce and succession and also peripheral matters with which history has burdened the personal law, such as pre-emption. The editor, the author's son, is a solicitor, and cannot be expected to indulge in academic speculation, but his handling of *Khurshid* v. *Mhd. Amin*, P.L.D. 1967 S.C. 97 is sadly inadequate and unimaginative.[2] Recent articles on germane matters, such as "justice, equity and good conscience" or family arrangements, tend to be ignored.

The justly popular *Tyabji* will, even if it loses something of its savour at the hands of editors, always be superior to the severely utilitarian *Mulla*. Yet the latest editor of *Mulla* ventured to comment on the movement to reform Muslim law, a field into which Mr. Tayyibji does not care to enter. This edition notes cases and their effects and the Muslim Family Laws Ordinance 1961 somewhat uncritically. Many reported cases are added, though they have decided nothing new. Notoriously little is contributed by the *generality* of cases in Muslim law: and that makes the exceptions stand out. Decision-plagued Indian law is like a garbage heap: not without the occasional treasure. The present editor is silent on the law's powers of growth.[3]

This he might have spoken about had he wished. Even for practical purposes the spirit of the law is potent (see *Kunhu* v. *Ummayithi*, 1969 Ker.

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[1] A reviewer must protest at the U.K. price, £5, which is unconscionably more than the price in India.

[2] Here at *Addenda*, p. 1067 (*ad.* pp. 1, 44). Briefly stated by Coulson at Derrett, ed., *Introduction to Legal Systems* (London, 1968), pp. 76–77, that case attempted a juridical revolution.

[3] A comment on the appropriateness for India of the reform in Iran would have been welcome: see Hinchcliffe at (1968) 17 I.C.L.Q. 516–521.

L.T. 418, which doubts Muslim women's rights to refuse to come to court). Muslim law is on the eve of substantial reform. Hindus need only recover courage and the task is as good as done. Muslims' excitement in other jurisdictions, claiming that their law (in its modern corrupt state) is God-given, not to be tampered with by Man, will not impede progress for ever; for those who cry that their consciences are endangered must admit that the civil law can be reformed provided they are left to arrange their affairs, *e.g.* by will, to suit their consciences. Whether the vaunted advances in case-law in India and Pakistan really imply that statutory reform is superfluous is a question which this editor leaves alone. Had he commented adequately on the star cases he would have gone half way towards performing that function, and the blessing of Islamic principles would have strengthened even a glamorous case in future practice. In 1940, on the other hand, people were preoccupied with the project of converting "anomalous Muslims" to juridical orthodoxy *en bloc*.

On Muslims governed by Hindu law (see § 2, p. 15) I recommend a study of *Hajee* v. *Ebrahim*, A.I.R. 1921 Mad. 571 and *Abdul* v. *Abdul*, I.L.R. 1945 Mad. 276 before reconsidering *Noorbanu's case* (p. 1057, referring to p. 22, line 2). On the Laccadives, see *Sheikriyammada* v. *Adm. Union Territory*, 1967 Ker.L.T. 895.

A few leading cases on conflicts of law are mentioned (*e.g. Jatoi* v. *Jatoi*, P.L.D. 1967 S.C. 580, see Pearl at 11 J.I.L.I. 362) but *Att.-Gen. of Ceylon* v. *Reid* deserved more than the footnote attention it gets at p. 8; and an independent treatment of the effect of conversion would be desirable. The reference to *lex loci* at page 27 needs revision in the light of *Khatubai* v. *Mhd. Haji* (1922) 50 I.A. 108 (see 58 Bom.L.R., J. 85 and 14 I.C.L.Q. 1370–1375). The paragraph seems wrongly placed.

Some editorial features are awkward. For the next edition a coadjutor might be employed to cut down repetitions and revise the "code" to agree with the commentary on it. For an example, see paragraph 607. Indeed some readers *like* to be told a thing twice (it helps them to believe it); but the book could be even more reasonably priced. I do not find the treatment of judicial divorce for cruelty adequate (see §§ 212–216): the valuable case of *Itwari* v. *Asghari*, A.I.R. 1960 All. 684 (Fyzee, *Cases*, pp. 188 *et seq.*) does not seem to be mentioned—and I doubt if my failure to trace it is due to the neglect to put the Index of Cases into alphabetical order. I cannot find a reference to *Khatizabai's Case*, A.I.R. 1960 Bom. 61 (the archaic *wakf-al-aulad*), nor to *Nur* v. *Malka*, P.L.D. 1961 Lah. 431 (on Hindus being Khojas). The reference to Hindu law at page 231, note 16, is inaccurate (see [1967] 1 M.L.J. J. 15 *et seq.*). But these are minor cavils.

J. DUNCAN M. DERRETT.

CHITTY AND JACOB'S QUEEN'S BENCH FORMS. Twentieth edition. By I. H. JACOB, LL.B., a Master of the Supreme Court, Queen's Bench Division, Fellow of University College, London. [London: Sweet & Maxwell. 1969. xxvii and 1198 pp. £15 15s. net.]

WHEN the last edition of this work appeared in 1965 Master Jacob's name was joined to the hallowed one of Chitty, sole tenant since 1884. As Lord Parker wrote in his Foreword to that edition, the renaming was apt because of the immense amount of work done by Master Jacob and not least by reason of the coming into force of the Revised Rules of the Supreme Court in 1964. Since the last edition the second stage of the revision has been completed, the forms of judgments and writs of execution have been much altered, and the Civil Evidence Act 1968 has led to some important new Rules which became operative in October 1969. Although the purpose of the work is to provide the Forms, other than pleadings, which may be used during litigation in the Queen's Bench Division, practitioners should find the notes of great value. An examination, for instance, of the section dealing with the prerogative orders, shows how usefully there has been summarised the various procedural steps. In his preface, Master Jacob observes that the cumulative effect of recent changes has been enormous, and practitioners should warmly welcome the fruit of his labours.

F. O'DONOGHUE.

Book Notices

WORDS AND PHRASES LEGALLY DEFINED. Second Edition. Five Volumes. Edited by JOHN B. SAUNDERS. [London: Butterworths. 1969 and 1970. £5 10s. per volume.]

THE first edition of this work was made up exclusively of extracts from speeches made and judgments given in the superior courts of the United Kingdom, Australia, Canada and New Zealand. The second edition has been broadened in scope by adding a selection of textbook and statutory definitions. Most of the textbook definitions have been taken from Halsbury's *Laws of England*, for which this work is designed to be a companion.

All five volumes are beautifully produced and are a pleasure to handle. All sorts of impressions are gained by browsing through the pages. There are the fascinating odd words and phrases defined and also many useless definitions for general purposes. Thus we are offered two choices for "woman": either "a woman of the age of eighteen years or upwards" (Employment of Women, Young Persons and Children Act 1920, s. 4) or "a woman who has attained the age of eighteen" (Factories Act 1961, s. 176). Such statutory definitions are less attractive or useful than judicial attempts for example to define "man": "No doubt, the word 'man,' in a scientific treatise on zoology, or fossil organic remains, would include men, women and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connection, the word 'man' is used in contradistinction to 'woman.' Certainly this restricted sense is its ordinary and popular sense." (*Chorlton* v. *Lings* (1868), *per* Byles J.) "Boys" and "girls" are not defined; "minor" unfortunately is defined only by reference to the British Nationality Act 1948, s. 32, as meaning a person who has not attained the age of twenty-one years, although three headings later (following Minor Canon and Minor Tenancy) under the heading of "Minority" there is a reference to the Family Law Reform Act 1969, s. 1, which in Schedule 1 in fact expressly reduces the age in the British Nationality Act from twenty-one years to eighteen. Throughout the work, however, the editing is remarkably up to date: we have a definition of "mushroom" for the purposes of the Theft Act 1968; "hovercraft" under the Hovercraft Act 1968; "possession" includes extracts from *Warner* v. *Metropolitan Police Commissioner* (1968). Although browsing is fun, the proper test of a collection such as this is whether it provides definitions and quotations of value in the course of one's work. On this basis, when the work has been consulted it has proved itself beyond any doubt. We are indebted to the editors for such an interesting and invaluable work

THE COMPANY EXECUTIVE AND THE LAW. By DAVID SPRINGFIELD. [London: Heinemann. 1970. 296 pp. £3 3s.]

THIS, as the Foreword informs us, is a practical book; not a book on company law but rather one on the legal aspects of company administration, touching on such subjects as taxation, redundancy and, more surprisingly, defamation.

Mr. Springfield provides concise and generally unobjectionable answers to many of the questions likely to be raised by the busy executive or the inquiring student.

LEGAL CASES FOR TEACHERS. By G. R. BARRELL. [London: Methuen & Co. Ltd. 1970. 480 pp. inc. index. £5 net.]

THIS is a case-book containing summaries and extracts from the judgments of nearly 150 cases concerning legal aspects of education in schools ranging from the administration of education and of schools, conditions of service, parents, punishment, negligence, defamation of teachers and even a few cases concerning universities. It is a companion volume to the author's *Teachers and the Law.*

BUILDING SOCIETY LAW: CASES AND MATERIALS. By C. E. I. THORNTON AND J. P. MCBRIEN. [London: Sweet & Maxwell. 1970. 151 pp. inc. index. £1 5s. paperback. £2 hardback.]

THIS is designed to be a companion volume to Wurtzburg and Mills' *Building Society Law.* It will serve primarily students and practitioners of building society practice but, in spite of the fact that the extracts from cases are very short, it will be of interest to a wider public concerned with the law relating to mortgages.

MANUAL OF PUBLIC INTERNATIONAL LAW. Edited by MAX SORENSEN. [London: Macmillan. 1968. 930 pp. inc. index. £8 8s. net hardback, 18s. paperback.]

THIS work was reviewed at (1969) 32 M.L.R. 467 by Mr. A. Samuels who suggested that a paperback edition should be made available for the benefit of students. A paperback edition is now available in England at 18s.

CORRESPONDENCE

THE EDITOR,
The Modern Law Review.

Sir,

In his penetrating and refreshing analysis of *Boys* v. *Chaplin* [1969] 2 All E.R. 1085, in (1970) 33 M.L.R. 1, Dr. McGregor, after establishing what the case did *not* decide, suggested that the following propositions could be advanced:

> "(1) the issue is not one of procedure, and therefore English law is not to be applied as the procedural law; (2) *Machado* v. *Fontes* is overruled, and therefore English law is not to be applied as the dominant substantive law; (3) no proper law doctrine is accepted, and therefore English law is not to be applied as the proper law. Hence Diplock L.J.'s dissent in the Court of Appeal stands and Maltese law is applied!" (at p. 14)

These logistics are not unlike saying because two and two is neither three, five, nor ten, arithmetic must be spiced with nutmeg. However, my reason for writing is not to challenge Dr. McGregor to a syllogistic duel, but to challenge the assumption—fundamental to his position—that Lord Wilberforce was "prepared to create a limited exception to the applicability of the *lex loci delicti.*" Without the support of Lord Wilberforce, Dr. McGregor has lost his majority, and his conclusions their value. It is submitted that throughout his speech, Lord Wilberforce makes it perfectly clear that past decisions—which he was not prepared to overrule—though giving some effect to the *lex loci*, have traditionally regarded English law as the dominant partner, relegating the foreign law to the subordinate role of supplying, by way of defence, a plea which, if effective according to that law, will in some circumstances be given effect to in England—

> "a person should not be permitted to claim in England in respect of a matter for which civil liability does not exist, or is excluded, under the law of the place where the wrong was committed. . . . I would therefore restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done" (*per* Lord Wilberforce at p. 1102).

This is a classic re-formulation of the rule in *Phillips* v. *Eyre* (1870) L.R. 6 Q.B. 1 save that Lord Wilberforce insists that the act complained of must give rise to *civil* liability where committed, unless the connection between the parties and the place of commission is too peripheral, ultroneous or fortuitous to be legally relevant.

However, even assuming that Lord Wilberforce were indeed a party to Dr. McGregor's heresy, I am wholly unable to comprehend why the overruling of *Machado* v. *Fontes*, *i.e.* insisting that henceforth the act complained of must give rise to *civil* liability according to the *lex loci delicti*, involves the proposition that "English law is not to be applied as the dominant substantive law."

Whilst *Boys* v. *Chaplin* has proved a few yards short of a milestone, a bare majority has, if nothing else, conferred the senior partnership on English law *qua lex fori*, whilst the lex loci is the au pair with the occasional Sunday off.

Thus, although Dr. McGregor may have gained fresh insights into what the law ought to be, it is unfortunate that they are not shared by a majority of the House of Lords.

P. GERBER.

Institut für Internationales und Ausländisches Privatrecht der Universität Köln.

Mr. McGregor replies:

With respect, but equally with conviction, I regard Dr. Gerber's above analysis as totally misconceived. He fails to take into account the fact that there are *two* propositions implicit in *Machado* v. *Fontes*—a fact reflected in the two unsuccessful pleas of the defendant and brought out very clearly by Diplock L.J. in the Court of Appeal in *Boys* v. *Chaplin* [1968] 2 Q.B. 1, 34-35—and that *both* these propositions are rejected by Lord Wilberforce. The propositions are that the plaintiff was entitled to succeed in his claim for general damages for libel (1) even if there was no civil as opposed to criminal liability by the *lex loci delicti* and (2) even if there was civil liability by the *lex loci delicti* but extending only to allowing special damages. In restating the basic rule so as to require civil liability by the *lex loci delicti*, Lord Wilberforce clearly envisaged not only that the *existence* of civil liability by the *lex loci delicti* must be shown but also that the *extent* of that civil liability must be as great as would be imposed by the *lex fori*. Thus under the basic rule the plaintiff will be limited to his pecuniary loss if this is all the *lex loci delicti* will allow even if English law would be less restrictive. There is therefore no question, under Lord Wilberforce's basic rule, of the *lex loci delicti* playing a "subordinate role," and indeed the proposition that English law—that is, English law as the *lex fori*—"is not to be applied as the dominant substantive law" must follow; the *lex fori* and the *lex loci delicti* have equal control of the situation and a plaintiff's claim will fail to the extent that he cannot satisfy both.

This then is Lord Wilberforce's basic rule. Yet, like his brethren, he was prepared to allow the plaintiff damages for his non-pecuniary loss and so reached a result which the *lex loci delicti* would not have countenanced. This was because he arrived at the further conclusion that, in applying his basic rule, the claims of the *lex loci delicti* must in exceptional cases defer to the claims of the proper law which must then be substituted for it, that *Boys* v. *Chaplin* was such an exceptional case, and that the proper law was English; accordingly, the "fundamental assumption" that Lord Wilberforce was "prepared to create a limited exception to the applicability of the *lex loci delicti*"—that is, as the law to be applied side by side with the *lex fori*—is completely justified. English law was applied by Lord Wilberforce not because, as the *lex fori*, it was the dominant substantive law but because it was the proper law *as well as* being the *lex fori*. Indeed, had not Lord Wilberforce rejected the second as well as the first proposition implicit in *Machado* v. *Fontes*—so that English law as to heads of damage could have been applied once it was established that Maltese law would recognise *some* degree of civil liability—there would never have been any need for him to trouble to explore the concept of the proper law and to base his decision upon a limited acceptance of it.

THE EDITOR,
The Modern Law Review.

SIR,

Mr. Goldberg, in his brief but passionately argued support for the view that the general meeting may exercise the powers of the company not specially delegated to the directors, does not do justice to his view of the law ((1970) 33 M.L.R. 177). For he has, presumably because he is a Victorian, not referred, for support of the view he puts forward, to the New South Wales decision of *Dowse* v. *Marks* (1913) 13 S.R. (N.S.W.) 332. In that case Harvey J. (as he then was), in interpreting clause 103 of the Articles of Association of George Marlow Ltd., a clause which whilst it differed in minor contextual ways to Art. 80 of English Table A, was nearly the same clause, held that the general meeting did have the power to "run the company." It was argued in this case that the Managing Director, unlike the Board of Directors, was not subject to the control of the company in general meeting. Reliance was sought by the Managing Director on the decision in *Cunningham's* case [1906] 2 Ch. 34. However, Harvey J., resting in the main on the interpretation propounded by Neville J. in *Marshall's Valve Gear Co.* v. *Manning Wardle & Co. Ltd.* [1909] 1 Ch. 267, felt that in the absence of specifically delegated power, the Managing Director could not be said to exercise greater powers than the Board, which itself was "controlled" by the general meeting, except where it was delegated special power. Outside of this delegated field of authority the Board was "subject to control by the vote of a simple majority of the company in general meeting . . ." (13 S.R. at p. 348).

It may be argued that the decision in *Dowse* v. *Marks* turns on its rather unusual fact situation. It has not been distinguished by any later case, although it was decided well before *Shaw's* case [1935] 2 K.B. 113 and *Scott* v. *Scott* [1943] 1 All E.R. 582.

The recent decision of Plowman J. in *Bamford* v. *Bamford* [1968] 3 W.L.R. 317 supports the line taken by Professor Gower, and Mr. Goldberg has this decision to contend with as well. It is unlikely, despite the reasons that Mr. Goldberg puts forward, and despite the decision of Harvey J. in *Dowse* v. *Marks*, that the courts are likely to depart from the thesis put forward by Professor Gower (see also Pennington, *Company Law* (2nd ed.), pp. 481–482).

The general meeting is becoming, it would seem, no more, in many cases, than a rubber stamp (see Court of Appeal in *Bamford* v. *Bamford* [1969] 2 W.L.R. 1107) and to ensure "control" or at least a power of review, the Articles will have to be a good deal more specific (see Pennington, *Company Law* (2nd ed.), p. 482).

R. BAXT.

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THE EDITOR,
The Modern Law Review.

SIR,

In his interesting article "Animus Deserendi in Constructive Desertion" ((1970) 33 M.L.R. 144) Mr. Frank Bates suggests that it is particularly important "to reconsider first principles, as the Divorce Reform Act 1969 would seem to make no difference to the notion of desertion, apart from the reduction of the required period to two years."

This is, no doubt, accurate if desertion is regarded in isolation. But, with respect, it overlooks the implications of section 2 (1) (*b*) of the 1969 Act, which provides that breakdown may be presumed if "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent." It follows that if the respondent's conduct is such as (under the old law) would constitute the *factum* of expulsive conduct, the petitioner will be able to proceed (immediately, without the two years' delay necessary in desertion cases) under section 2 (1) (*b*). The state of the respondent's mind, the implications of which caused such confusion, cannot be relevant, unless either (a) it affects the reasonableness or otherwise of the petitioner being expected to live with the respondent, or (b) a particular intention aggravates conduct which would not normally be sufficiently grave and weighty to justify the termination of a marriage.

The relevance of the problem which Mr. Bates analyses would therefore seem to be limited to proceedings in magistrates' courts, where the matrimonial offence still survives in its traditional form,

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THE ROLE OF THE LAWYER IN ADMINISTRATIVE JUSTICE *

JUST in case I do not manage to do in this lecture what I am setting out to do, I should explain that over the past twelve months or so I have been trying to establish by personal observation what the present role of the lawyer is in administrative decision-making. I am attempting to give a fair impression of what I have seen, not only in England, but also in the United States and Australia. Also I am attempting to put into words some of my own thoughts as to what the role of the lawyer *should* be.

It is necessary to point out that I am *not* attempting to belittle the part that lawyers are currently playing in administrative activities—there has been more than enough of that already. Certainly I have found much to criticise; but it is my thesis that many of the deficiencies of British and Australian administrations have been caused by the reluctance of lawyers to intervene decisively. That reluctance has resulted, no doubt, from the oft-expressed views of politicians and members of the public that creation of fair procedures and effective review of administrative decisions, in which lawyers are involved, will not only hamper effective administration and speedy decision-making, but will also provide a bonanza for lawyers. The final comment is probably best ignored but the "hampering" view is unfortunately accepted by too many people—including eminent lawyers. I personally can never accept the idea that fair procedures and high-quality judicial review inevitably result in inefficiency. Perhaps there is some delay; but this seems to me to be a cheap price to pay for fairness in administration.

I should confess my special interest in this question. I am a member of an Administrative Review Committee appointed by the Australian Federal Government to investigate and report on the subject of administrative justice and judicial review. The members of the committee comprise a Federal judge, Mr. Justice Kerr, a

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* This article is based on a University of London Public Lecture in Laws delivered at the London School of Economics on November 25, 1969.

New South Wales Appeal Court judge, Mr. Justice Mason, the Commonwealth Solicitor-General, Mr. Ellicott, Q.C., and myself. Although I am the sole academic on the committee I am confident that there will be no occasion for me to repeat Lord Denning's lament that the chances about us doing something useful are three to one against! As a result of this appointment I have been making a special study of administrative adjudication and administrative decision-making in the three countries I have mentioned. Because New Zealand has established a new Administrative Division of the Supreme Court and has for some years had a very efficient Ombudsman we shall also be studying New Zealand developments.

I must emphasise that the views expressed in this lecture are my own views and not those of the Administrative Review Committee.

It does seem that we in Australia are committed to the establishment of a new federal court, to be known as the Federal Superior Court, under the High Court—which will probably have an administrative division.[1] But while this is a major development it gives no answer to the wider question of what the role of the lawyer is to be.

Most of you will be fairly familiar with the administrative arrangements of the United Kingdom and the United States but you will not be so familiar with those in Australia—beyond the fact that we are operating under a federal system. In both federal and state spheres we do have central government departments not too dissimilar from those in England. We also have masses of independent and semi-independent public authorities; and some of them possess adjudicating functions—a good example would be the federal and state Public Service Boards. Some of these bodies, for example, the Victorian Transport Regulation Board and the Federal Broadcasting Control Board are more akin to United States administrative agencies than to any British model. In the Australian states and in the federal administration there are numbers of administrative tribunals. I am especially concerned with federal bodies and there are, in this area alone, some fifty tribunals or groups of tribunals, including the Conciliation and Arbitration Commission, the Public Service Arbitrator, War Pensions Entitlement Tribunals, Taxation Boards of Review, the Trade Practices Tribunal, the National Literature Board of Review, and the Coal Industry Tribunal. In addition there are masses of discretionary powers not subject to hearing procedures and reviewable, if reviewable at all, only by the prerogative writs.

This then is the Australian background, to be added to the United Kingdom, United States and New Zealand background, against which lawyer participation has to be measured. It is, I suppose, merely stating the obvious to point out that lawyers *can* participate at a number of levels in the entire administrative structure. I want to deal with some of the main ones—lawyers as administrators; as the advisers and representatives of parties involved with administrative decisions (both government and private); as adjudicators (chairmen of tribunals, members of agencies, hearing examiners, inspectors and so on); and, finally, as judges of the reviewing courts. Another vital category is to be found in the place of the lawyer as parliamentary draftsman—but that needs a lecture to itself.

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[1] At this time it seems possible that legislation introduced into the Federal Parliament to create the Superior Court will not be proceeded with.

LAWYERS AS ADMINISTRATORS

I am not entirely sure about this but it seems to me that the first category, lawyers as administrators, is comparatively unimportant in Britain. I may be wrong since I know that some law graduates do enter the civil service; but I have certainly met few lawyers in high administrative places. This is curious having regard to the history of the administration and the courts—but it appears to be a fact. It is also in marked contrast to the position in the Common Market countries. The position is far different in the United States and the Australian states where a fairly high proportion of graduates go into government service as administrators and *do* rise to the top administrative positions. In New South Wales, for example, lawyers head many of the major departments—not only justice but also works, health, local government and other departments from time to time. At the moment two out of four members of that state's Public Service Board are lawyers—it used to be three (one has to be an educationalist under the Public Service Act). The current trend in the United States seems to be towards more, and yet more, young law graduates going into government service: simply because they feel they can perform a more useful role in the community as government lawyers or administrators than as private practitioners.

One result has been a high regard for procedural safeguards, natural justice and due process, in the Australian states and the United States. I make this point because of the contrast between say, the New South Wales and the federal public service—in the latter service where lawyer recruitment has been lower there is much less regard for procedural fairness and much more secrecy. Some years ago, during a conference in which the New Zealand Ombudsman participated, it was interesting to observe the marked contrast between the reactions of State public servants and federal public servants to Sir Guy Powles' strictures about open administration and the giving of reasoned decisions.

A direct effect of greater lawyer participation in Australian administration has been the offering of courses by the law schools in such subjects as administrative law, air and transport law, local government law and practice, legislative process—additional to the traditional subjects of British and federal constitutional law.

One hopes this development will pay dividends in the level of practice generally. Another development has been the growing popularity of combined arts degree—law degree, and economics degree—law degree courses.

LAWYERS AS ADVISERS AND REPRESENTATIVES

This second category is of quite crucial importance. In Australia I think it is fair to say that there is a growing tendency for lawyers to represent persons involved in administrative decision-making—especially before tribunals.[3] Legal aid schemes do not generally go that far—though there are special arrangements to cover industrial accident tribunals—but individuals, and especially the trade unions, have become convinced of the need for representation before disciplinary and promotion tribunals, conciliation and arbitration tribunals and tax tribunals. In the case of tax tribunals accountants have, in the past, to some degree pre-empted the field. Happily there now seems to be a trend toward legal representation in the majority of cases. This may be due to the increasing complexity of tax legislation. It may also be due to the inclusion of tax law in graduate and undergraduate courses in the law schools. *But* there are still some large gaps which can be filled only by extended legal aid or creation of some special arrangements. It is my view that this must be done if we are to have fairness in administrative decision-making. I will also have some comments to make about the quality of representation.

In the United States legal representation before federal agencies is almost universal. This is not the position in many of the states—and this, in my view, accounts for the administrative unfairness, and even lawlessness, which is so much complained about by various civil rights groups. In some states, despite Administrative Procedure Acts, pre-hearing procedures on such matters as licensing are virtually non-existent. True it is that remedies exist in the federal courts but most of the sufferers cannot afford legal representation.

The situation in the United Kingdom is, it seems to me, far from being satisfactory. There may be little corruption and a vast amount of goodwill—but there is a lot of unfairness too. The fact is that the Franks Committee idea of an informal atmosphere in which an ordinary man may have a fair hearing is just not working. I have visited dozens of tribunals—rent tribunals, rent assessment committees, insurance commissioners, national insurance local tribunals, medical appeal tribunals, supplementary benefit tribunals, industrial tribunals, and so on. I have also had discussions with senior administrative officers in some of those departments which wield wide discretionary powers. It seems that legal representation, or indeed any representation, is the exception rather than the rule. It is not putting it too strongly to say that I have been appalled at some of the *apparent* failures to give justice in hearings before tribunals and other bodies. I say *apparent* because in some cases I never did find out the result; in others I can only surmise as to what a *fair* hearing might have produced.

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[3] See *e.g.* Willheim, "Legal Representation Before Administrative Tribunals" (1969) 43 A.L.J. 64.

I have read Professor Street's Hamlyn Lectures on *Justice in the Welfare State.* I must say that I thought he was unduly satisfied with the social security tribunals in particular. From the point of view of fairness the system has many faults. And certain it is that a good number of the faults attributable to all tribunals flow from the lack of adequate legal assistance and representation.

The commonest situation before tribunals—very common indeed—is that the claimant or party is completely inarticulate. Sometimes he or she is literally trembling before the tribunal. How justice can be accorded to someone who fails to say anything, or merely mumbles a few words, I fail to see. In many cases the applicant is confronted by an official, or an employer, or a landlord's solicitor who has the facts fully marshalled and is prepared to argue the point at issue. I have seen many cases in which the claimant quite obviously did not understand what the issue was and, certainly, he was unable to present facts or argument in any coherent way. In others the applicant did not know what documents were required, or even what documents were relevant. When evidence as to facts is given—perhaps by an official, or an investigator—the applicant is in no position to test veracity by cross-examination.

May I give some examples—without identifying particular tribunals.

1. Before an industrial tribunal a man was seeking a redundancy payment. He sat quite mute while his employer's son addressed the tribunal—the son was articulate and knew exactly what the point at issue was. He gave quite a lot of evidence. When the applicant was invited to speak he spoke about three sentences and subsided. The chairman encouraged him to ask questions and indeed tried to frame some for him. It was hopeless. The man failed in his claim. Afterwards I asked him if he felt he had had a fair hearing. " No," he said, " that so and so was lying." " But why didn't you contradict him or ask questions," I asked. I got the expected answer, " I just can't do that—I don't know how."

2. Before an insurance commissioner on a resumed hearing, for which the applicant had travelled some distance, the applicant sat silent while the Minister's representative put his case. Despite every encouragement from the commissioner he asked no questions. He produced one document, a medical report, on request. He was obviously unaware that it completely prejudiced his case until the commissioner pointed it out, and had nothing to put forward in rebuttal. He lost his case.

3. The chairman of one national insurance local tribunal informed

a claimant of the case he had to meet—for the first time in clear words—just as the claimant was going out of the door of the hearing room.

4. A medical appeal tribunal in quite unabashed fashion based its decision on evidence and opinions which were not disclosed to the applicant. Furthermore, although the evidence was discoverable the opinions were not mentioned in the decision.

5. Before several rent tribunals and rent assessment committees the landlord's agent or solicitor produced quite a deal of evidence, including evidence from expert witnesses, and a flood of argument on economic factors, comparable values, and prior decisions. The various tenants said nothing or merely made a few complaints about leaks, damp patches and so on—despite prodding by the chairman they asked no questions. I am aware that in such cases the view of the premises is often decisive but there was not the slightest appearance of a fair *hearing*.

6. A supplementary benefits tribunal had perforce to rely on the reports of investigating officers who had to some extent based those reports on neighbourhood gossip. There was no attempt to test the witnesses or to bring evidence in rebuttal. There were, too, some signs that the decision rested on sociological surmise.

On the other hand I have seen some excellent, but isolated, instances of first-class representation—usually by counsel or solicitors. I, at least, am convinced that proper legal aid is absolutely essential—and I hope that I may have persuaded some of you that I am right.

But there then arises the question of quality of representation. Do lawyers give good enough service to warrant extended legal aid? Unfortunately, the answer is not an unqualified yes. I should like to point out some types of legal representation which cause difficulty—indeed some of them are influencing administrators, politicians, and even tribunal chairmen, to disfavour all legal representation in administrative matters.

(a) First, there is the Perry Mason in real life—the criminal lawyer *par excellence*. He can do an immense amount of harm. He will engage in the most vicious cross-examination at the expense of administrative officers and others; indulge himself in the most reprehensible forensic tricks, and is not above imputing the worst of motives to every civil servant he has before him. I remember some years ago an inquiry into the efficiency of an Australian department. This was an open inquiry—not a disciplinary inquiry although that could follow—into allegations of corruption in the department. Some of the officers involved briefed an eminent Queen's Counsel. He decided to turn the affair into a criminal trial—and was allowed to get away with it. He cross-examined senior officers for days on end—accused them of dishonesty, inefficiency, and other sundry offences. He established, to his satisfaction, that the senior officers were dishonest, by the oldest trick in the book. He asked a series of wide questions at repeated intervals spread over hours of questioning—then he pointed to discrepancies of detail in the answers. It was quite a performance. He succeeded in obfuscating every issue before the tribunal and in poisoning personal relationships in the department for years to come.

Similarly, before a disciplinary tribunal where I was counsel for the Public Service Board I sat virtually helpless while a senior counsel blackened the reputation of a well-respected mental hospital manager, the allegations being all without any foundation whatsoever. Eventually I persuaded the presiding judge to stop it—but the harm was done.

What these men forget is that administration is a continuing thing. These criminal lawyer tactics not only poison such relationships as employer and employee, landlord and tenant, colleague and colleague, but they hinder administration by making administrators cautious, and reluctant to place themselves in a situation where they might have to undergo the ordeal of cross-examination. I have seen many examples of this in Australia and it is common before such bodies as the National Labour Relations Board in the United States. I believe it is less common here, but committee chairmen tell me that it does occur.

(b) Secondly, there are " the right way to do things men " and there is only one way—and that is the way of the superior courts. Both solicitors and counsel are guilty. They will try to insist that pre-hearing procedures and hearings before administrative bodies be exactly the same as in the superior courts—thus entirely missing the point of administrative action. They will insist, if possible, on *formal* exchange of documents and discovery. Our High Court frowned on this in *Ada Sutton's case.*[3]

Counsel and solicitors will do their very best to persuade a tribunal to apply the exclusionary rules of evidence—despite clear directions to the contrary in the governing statute or regulations. The Australian tax boards of review are apparently easy to persuade. The recent Voyager Royal Commission in Australia fell for this sort of persuasion too. This was the inquiry that followed the *first* time the carrier *Melbourne* cut a destroyer in half! And it was an extreme case of the havoc that lawyers can create in administrative inquiries.

This is the type of representation, *i.e.* turning every hearing into an adversary trial, that is most condemned by tribunal chairmen here. Indeed I believe that it has led the insurance commissioners to recommend *against* free legal assistance before them. Senior administrative officers have also objected to the way in which some solicitors endeavour to inject court-like procedures into all types of negotiation.

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[3] *Sutton* v. *Commissioners of Taxation* (1959) 100 C.L.R. 518. While it is easy to agree with the court's language rejecting the introduction of court-like procedures into an administrative jurisdiction it may be demonstrated that the decision produced some unfairness by not insisting on disclosure of information. The court itself seems to have realised this in *Giris Pty. Ltd.* v. *Commissioner of Taxation* (1969) 43 A.L.J.R. at 102 and 106.

(c) Thirdly, there is the technical expert. He is only marginally different from the previous type. He will lecture a tribunal, sometimes a lay tribunal, on the most abstruse technicalities of the law of evidence, statutory interpretation and administrative law generally. Shortly before leaving Australia I saw counsel addressing a tribunal on the question whether a breach of the rules of natural justice made an administrative decision void or voidable—this was at about the time that the Privy Council and the House of Lords were so thoroughly confusing the issue! Counsel's arguments had little to do with the case—although no doubt they impressed his client—but the point I am trying to make is that the tribunal had not the foggiest idea what he was talking about.

It is rather obvious, I think, that this sort of approach—with its emphasis on legal technicality—will tend to waste time and prejudice a tribunal. Worse still it will raise doubts about the value of legal representation.

(d) Fourthly, one sees occasionally the "above it all" type who is at pains to establish to the tribunal, and to his audience, if any, that administrative adjudication is really beneath his dignity—after all Dicey said that such jurisdictions did not exist! Quite naturally a lawyer who feels that his only place is before the superior courts is unlikely to do a good job for his client in the administrative context.

(e) Finally, there is the related type—the most common of all—who does not prepare a case at all in advance or does it half-heartedly—because, in his opinion, tribunals deal only with *trivial* matters. I have seen counsel put out of a tribunal one after another on jurisdictional grounds—at thirty guineas a time—simply because they did not bother to look up the statute. Both here and in Australia I have seen counsel working out their case as they go along—and very badly too! These men certainly overlook their duty to a client but they also forget that many administrative decisions involve larger amounts and more significant issues than many civil actions. One could perhaps mention that industrial development grants from the Board of Trade are currently running at £450 million per annum!

I am not, of course, suggesting that all legal representation before administrators is of poor quality—indeed in the large majority of cases lawyers provide good representation—as they should. I would however suggest that in its own interest, and in the interest of the public, the legal profession ought to recognise an obligation to improve the competence of its members who appear before tribunals and administrators—and to discourage the continuance of the kinds of conduct to which I have referred. It is a situation in which a few lawyers are so tarnishing the reputation of the profession that extension of legal aid is disfavoured even by the legally qualified chairmen of tribunals, let alone by the public and by the Government.

If the profession accepts such an obligation, how is it to be discharged? I do not pretend to know the answers. It is partly a question of legal ethics and partly a question of better training at graduate and undergraduate levels. It would help too, I think, if enactment of an Administrative Procedure Act could be secured. I believe that the Franks Committee idea of individually tailored rules for individual tribunals has perpetuated a degree of ignorance amongst practitioners as to the procedures of administrators and tribunals.

LAWYERS AS ADJUDICATORS

The third major category is " lawyers as adjudicators." Since the Franks Report it has become the case that most chairmen of tribunals, though by no means all, are qualified lawyers—counsel, solicitors or retired colonial and United Kingdom judges. Hearing examiners in the United States are usually qualified lawyers. In Australia the position of the lawyer chairmen is perhaps not so well established. After some waverings I now whole-heartedly accept the Franks Committee recommendations—despite some murmurings of academic criticism. It is, of course, especially important if either, or both, parties are unrepresented. The lawyer chairmen I have seen in action have done their very best to cope with unrepresented parties—that they have failed sometimes implies no criticism of them. I do not feel that they could have done more without running the risk of being accused of bias. But present-day lawyer chairmen have their faults—or at least some of them do. The worst by far is the attempt so often made to turn administrative proceedings into an adversary trial. This is very marked in the United States where it has been said that the only distinction between an administrative hearing and a trial is that there is no court official in the former case to shout " Oyez oyez " at the start of the proceedings. Perhaps the worst offenders are the hearing examiners of the Interstate Commerce Commission and the Federal Power Commission. Many lawyers complained bitterly to me about the proceedings before these agencies: the presentation of documents which had to be *read* and sworn on oath—despite the fact that they largely consisted of opinions and predictions based on economic data; the lengthy examination and cross-examination of witnesses—many of whom were quite unnecessary before a highly expert examiner; the cumbersome pre-hearing procedures, and so on. There can be no doubt that the procedures are quite ill-suited to the administrative task—which is usually the fixing of rates. No wonder the hearings sometimes extend into years. We in Australia adopt some of the same adversary trial-type hearings in conciliation and arbitration tribunals—largely because the adjudicators are usually judges and have been so traditionally. Even Taxation Boards of Review sometimes do their utmost to turn themselves into courts.

It does seem to me that the Franks Committee and the Council on Tribunals have succeeded in checking this development in the United Kingdom—although in some tribunals a decidedly court-like atmosphere is generated.

But there is another fault which is far more serious in the United Kingdom than in the other countries—there is far too often a tendency for the legal chairman to adopt a patronising attitude to the applicant before him. Indeed I have seen cases in which the hearing proceeded as if the applicant was not there—discussions proceeded on the firm basis that he had nothing to contribute. One can imagine the answer one would get to the question: "Do you think you had a fair hearing?" Or at least I can imagine the language an Australian might use—very few chairmen would be regarded as legitimate! The best tribunal I saw from this point of view was a supplementary benefits tribunal—the chairman was an accountant, but I thought the presence of two women on the tribunal helped to produce a friendly and sympathetic atmosphere. This tribunal however was somewhat defective in another way, I thought—the members were not skilled at weighing the value of probative evidence.

Despite these faults, which can of course be rectified, I find myself hoping that we in Australia will follow the United Kingdom lead and seek to have our tribunal chairmen legally qualified. In no country have I seen the job of chairing a tribunal done as well by laymen as by lawyers.

LAWYERS AS REVIEWING JUDGES

Lastly, I come to consider the position of lawyers as reviewing judges. In all the countries I have been considering the reviewing judges of the superior courts *must* be legally qualified. Not that that disposes of the whole question. We in Australia have followed the pattern in the United Kingdom of appointing judges from the practising Bar, with very, very few exceptions. In the Australian states, where the profession is fused, appointments have likewise been from the court practising side. Recent legislation permits appointment of solicitors in New South Wales and that has always been possible in the unified-profession states. Nevertheless, it will probably be a long time before the practising Bar is prised away from the exclusive privilege of having appointments to the Bench made from its members.

This is not the position in the United States, where many distinguished members of the Supreme Court and the Federal Circuit Courts have been government lawyers and academic lawyers.

The latter courts are very important in relation to judicial review and I have been most impressed by the quality of review given. This is especially true of the Circuit Court for the District of Columbia which for obvious reasons is becoming a very expert court indeed. American lawyers are, however, far from satisfied. Practitioners that I spoke to, particularly in Washington, New York and Philadelphia, would wish to see more expertise amongst the judges—in their view the courts are still far too inclined to back off when faced with a difficult administrative problem. On the other hand the general counsel of the agencies were opposed to the idea of a more qualified court—because it would probably mean more thorough review of their agencies. All put it that too much competence in the court would lead to the temptation to interfere too much in administrative business. The counsel for the Federal Communications Commission was quite vehement about it—his agency had been going through a bad time in the courts. This difference of opinion underlines the whole problem for us in Australia.

In the United Kingdom I have heard many adverse comments from members and chairmen of tribunals on the quality of review by the courts—and some even more adverse comments from senior civil servants. Allowing for the fact that no one likes to have his decisions overturned it does seem to me that some, at least, of the complaints are justified. I was referred to some cases which demonstrated the reviewing court's failings. None of these people objected to judicial review in itself—they merely objected to the fact that they were being reviewed by a body which, in some cases, did not fully understand the issues. The comment was also made that some cases are dealt with at first instance in a far too cursory manner. The very paucity of cases taken for review as revealed by the judicial statistics seems to show that something is wrong somewhere—either in the quality of review or in the determination and knowledge of practitioners—or perhaps in limitations on legal aid.

Many of the judges I have spoken to seemed to consider that there was some substance in the criticism—and some favoured establishment of a more specialised administrative court or division.

As you will know, there is a fair degree of unanimity amongst lawyers and judges on the need to rid ourselves of the technical restrictions on judicial review which have attracted so much criticism from laymen. The courts indeed are now showing the way—I need only refer to such cases as *Anisminic* v. *Foreign Compensation Commission* [4] and *Banks* v. *Transport Regulation Board* [5]—developments which I am sure have been largely inspired by the work of Professor de Smith. I favour " root and branch " reform, however, and hope that legislation to reform the entire " lack of system " will not be long delayed.

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[4] [1969] 2 W.L.R. 163.

[5] (1968) 42 A.L.J.R. 64.

As I said at the beginning of my lecture there is an almost firm Australian decision to establish a new Superior Court which may be entrusted with powers to review administrative decisions.[6] But no decisions have as yet been taken as to the appointment of judges—and we do have a constitutional problem. However I hope that we can find some useful solution—perhaps the appointment of assessors or even a decision to appoint judges from a wider field than is usual. In any event the court should develop an expertise of its own.

THE LAWYER'S ROLE

On the wider issues of the lawyer's role in administrative justice there is, of course, considerable disagreement. There are many, especially in Australia, who believe that no changes are necessary. I hope I have persuaded you that they are wrong.

My own views are far from settled but I do believe—(1) That we should encourage the idea that trained lawyers are well-trained to be excellent administrators—to have fair-minded men in the administration is the best guarantee of fairness by the administration.

(2) That there is a case, certainly in Australia, perhaps here too, for enactment of an administrative code to prescribe fair procedures not only before tribunals but also for general administration. Such an enactment would make possible more effective lawyer participation in decision-making. As I have already said, I do not consider the Franks Committee ideal of individual rules for individual tribunals to have worked well.

(3) That there should be a body such as the Council on Tribunals to exercise continuous oversight of the tribunals. I would prefer a smaller and more expert *full-time* body; but I hope that the views I heard one professor put forward the other day are not generally accepted. He thought the work of the Council was finished. I think it has just begun.

(4) That legal advice and representation must be made freely available in all types of administrative adjudication—by legal aid schemes or by other arrangements. You will have noticed that the Committee on Immigration Appeals accepted that legal aid would not be extended to tribunals in the near future—I hope the Committee is wrong—but it found it necessary to recommend some other and very unsatisfactory arrangements for aid and representation.

There are the two obstacles of high cost and shortage of lawyers. The first obstacle is something of a sham—of course fair adjudication costs more than unfair adjudication. The price just has to be paid. The shortage of lawyers can be overcome by methods which will readily occur to you all—above all by the allocation of adequate resources to the training of lawyers.

(5) The law schools and other organisations concerned with the

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[6] See note 1, *ante*, at p. 482.

training of lawyers must place much more emphasis on administrative law and practice. I would repeat my view that many decisions of administrators are already more important socially, and often monetarily too, than decisions of the lower courts.

(6) That judicial review must be made more of a reality than it is at present. Establishment of an administrative court or division will help, but provision also needs to be made for simple review procedures and for appointment of men to the court with adequate background training. Furthermore, the court or division must be given first-class research assistance.

If these things are done perhaps we can begin to talk about administrative justice.

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THE PROVINCE AND FUNCTION OF ASSESSORS IN ENGLISH COURTS*

THE practice of Courts of Admiralty calling upon the assistance of nautical assessors to advise them on matters of nautical skill and seamanship goes back for many centuries,[1] and even today the Admiralty Court is the only court which is regularly assisted by assessors in its proceedings. However, the power to seek the assistance of persons with a special skill, knowledge or experience is not confined to courts with Admiralty jurisdiction; county courts, all divisions of the High Court and the Court of Appeal may summon assessors in any civil proceedings, though few have ever done so.[2]

Assessors are especially valuable in proceedings where specialist knowledge or experience is frequently required, and where without their assistance either complex and often conflicting evidence would have to be provided by expert evidence or further specialist tribunals created to deal with such matters. There has indeed been a perceptible trend since the second half of the last century for statutes specially to provide for courts and judicial inquiries to be assisted by assessors in both nautical and non-nautical proceedings, and similar provisions apply today to many statutory committees, tribunals and inquiries.

The first part of this article will indicate the extent to which courts are empowered or required to summon assessors and who may fill this office. In the second part the function and practice of assessors will be examined.

PART I

1. *Courts which may be assisted by assessors (other than nautical assessors)*

In any proceedings before a county court the judge may, if he thinks fit on the application of any party, summon to his assistance as an assessor one or more persons of skill and experience in the matter to which the proceedings relate.[3] The judge thus has a discretion to refuse to summon assessors and contrariwise he is unable to call on their assistance unless an application is made by one of the parties. In several cases, however, these provisions have been altered. Thus, in proceedings under the Landlord and Tenant (War Damage) Act 1939, under Part I of the Landlord and Tenant Act 1927, or Parts I and II of the Landlord and Tenant Act 1954, under the Coal-Mining (Subsidence) Act 1957, and in reviewing the taxation by the registrar of the costs of any county court proceeding, the county court judge may summon assessors even though no applications has been made by any of the parties,[4] and in proceedings under the Race Relations Act 1968, he must be assisted by two race relations assessors.[5] It should be noted that if a statute specifically requires a judge to be assisted by assessors when hearing certain proceedings, he must sit with them, even though it is very unlikely that any question on which they could give assistance would arise in the case before the court, otherwise the court is not properly constituted.[6]

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* I am grateful to Mr. Kenneth C. McGuffie, the Registrar of the Admiralty Court and the Prize Court, for the assistance he has given to me in the preparation of this article and for allowing me to inspect and use information from his unpublished monograph on nautical assessors.

[1] The first reported case yet published of assessors assisting the High Court of Admiralty is *Re Rumney and Wood* (1541), Selden Society, Vol. 6, pp. 102–104 (trans. pp. 213–215).

[2] One of the rare occasions was when Devlin J. appointed a nautical assessor to advise him before arriving at his decision in *Southport Corporation* v. *Esso Petroleum Co. Ltd.*, see [1953] 2 All E.R. 1204, 1206 (Q.B.D.).

[3] County Courts Act 1959, s. 91 (1).

Assessors in county court proceedings may be drawn from a list of suitable persons prepared by the county court registrar at the direction of the judge.[7] This list, after its approval by the judge, is posted in the court office.[8] If the list contains no assessor with a skill, knowledge or experience relevant to the case to be heard, a suitable assessor will doubtless be chosen by agreement between the parties and sanctioned by the judge.[9] The assessors for proceedings under the Race Relations Act 1968 are appointed from a list prepared by the Lord Chancellor of persons who appear to him to have special knowledge and experience of problems connected with race and community relations.[10]

Any person who wishes an assessor to assist the judge must deposit the assessor's fee with his application for an assessor before the proceedings begin.[11] This may act as a deterrent against such applications being made, though as in most cases where the court is assisted by assessors and where their assistance is not specifically required by statute, the assessors' fees are part of the costs of the case and will thus generally be paid by the losing party.[12] Any party may take objection to a person proposed to be summoned as an assessor and the objection may be taken to him personally or in respect of his qualification.[13]

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[4] Landlord and Tenant (War Damage) Act 1939, s. 23 (2); Landlord and Tenant Act 1954, s. 63 (5); Coal-Mining (Subsidence) Act 1957, s. 13 (4); County Courts Act 1959, s. 91 (2A).

[5] Race Relations Act 1968, s. 19 (7).

[6] See *Re the Pilotage Act 1913*, *Soanes* v. *Corporation of Trinity House* (1950) 84 Ll.L.Rep. 482, 483–484.

[7] County Court Rules 1936, Ord. 31, r. 1.

[8] C.C.R., Ord. 31, r. 3.

[9] Such a situation is not provided for by C.C.R., Ord. 31.

[10] Race Relations Act 1968, s. 19 (7).

[11] C.C.R., Ord. 31, r. 6.

[12] See County Courts Act 1959, s. 91 (2). Assessors assisting in proceedings under the Landlord and Tenant Act 1954, and under the Race Relations Act 1968, are paid out of public funds (s. 63 (6) (c) and s. 19 (8) respectively) as are assessors who are summoned by the judge without an application being made by any of the parties under the Landlord and Tenant (War Damage) Act 1939 (s. 23 (4)), Coal-Mining (Subsidence) Act 1957 (s. 13 (7)), and the County Courts Act 1959 (s. 91 (2A) (b)).

Provision is made for the attendance of assessors in the High Court and the Court of Appeal by section 98 (1) of the Supreme Court of Judicature (Consolidation) Act 1925, whereby in any proceedings, other than a criminal proceeding by the Crown,[14] the court may, if it thinks fit, call in the aid of one or more assessors specially qualified, and hear the proceedings either wholly or partially with their assistance. A trial conducted by an official referee may also be tried with assessors.[15] If a judge decides to summon assessors to assist him in the review of a taxing officer's certificate he must appoint not less than two asssessors of whom one must be a taxing officer [16]; the other is customarily a practising solicitor nominated by the Law Society.[17]

Except for the special provisions concerning the review of a taxing officer's certificate, there are no special rules concerning who may be appointed an assessor in non-Admiralty proceedings in the High Court or the Court of Appeal, nor whether objection can be taken to a person so appointed. R.S.C., Ord. 33, r. 6, prescribes that proceedings with assessors "shall take place in such manner and on such terms as the court may direct," [18] and in practice, should the parties require the attendance of an assessor, the choice of a suitable person would be made informally between the parties and sanctioned by the court before the proceedings begin.

In proceedings under the Patents Act 1949, "an independent scientific adviser" may assist the court.[19] Although the term assessor is not used, the scientific adviser, when assisting the court, fulfils the same role. The High Court judge who constitutes the Appeal Tribunal under the same Act may also be assisted by a scientific adviser.[20]

The remuneration of assessors who assist the Supreme Court is a matter to be determined by the court,[21] though the fee will usually be the same as that paid to nautical assessors in Admiralty proceedings.[22] Scientific advisers under the Patents Act 1949 are paid out of public funds,[23] otherwise the assessors' fees are part of the costs of the case.

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[13] County Courts Act 1959, s. 91 (3). Objection may not be taken to assessors appointed to assist the court in proceedings under the Race Relations Act 1968.

[14] Though the former Court of Criminal Appeal was empowered to call upon the aid of assessors: Criminal Appeal Act 1907, s. 9 (e). Similar provisions still apply to the Courts-Martial Appeal Court: Courts-Martial (Appeals) Act 1968, s. 30 (2).

[15] Administration of Justice Act 1956, s. 15 (1); Rules of the Supreme Court, 1965 Ord. 36, r. 1. However, masters and special referees may not sit with assessors: R.S.C., Ord. 36, rr. 8 (1), 9 (1).

[16] R.S.C., Ord. 62, r. 35 (5).

[17] See editorial note (1969) 119 New L.J. 897.

[18] And see R.S.C., Ord. 103, r. 27 (2), concerning patent cases.

[19] s. 84 (2); R.S.C., Ord. 103, r. 27 (1).

[20] s. 85 (9); R.S.C. *loc. cit.*

[21] Judicature Act 1925, s. 98 (2).

There are no provisions for the House of Lords or the Privy Council to be assisted by assessors except in Admiralty proceedings, though until the reorganisation of the ecclesiastical courts in 1963 the Privy Council could hear ecclesiastical appeals with the assistance of archbishops and bishops of the Church of England as assessors.

2. *Courts which may be assisted by nautical assessors* *

All courts which are empowered to summon assessors may call upon the assistance of nautical assessors in relevant cases. Indeed, nautical assessors are generally summoned to assist county courts and the Supreme Court under the statutory provisions already discussed. They are here treated separately for three reasons: first, because only nautical assessors are regularly summoned to assist the courts and a considerable body of practice has developed concerning who shall be called to act as assessors in Admiralty and similar proceedings; secondly, because statutes have required the presence of nautical assessors in certain proceedings; and thirdly, because special Rules of Court apply to nautical assessors.

The assistance of nautical assessors in county courts will usually be confined to those county courts which have been appointed by the Lord Chancellor to exercise Admiralty jurisdiction.[24] At present there are forty-five Admiralty county courts,[25] including the Mayor's and City of London Court, which is deemed to be a county court and has Admiralty jurisdiction in the City of London.[26] The Liverpool Court of Passage, which is an inferior court of record, also has an Admiralty jurisdiction, which is similar to that of an Admiralty county court.[27]

In most Admiralty proceedings in a county court, an assessor will only be called upon at the request of one of the parties and with the permission of the judge, following the standard county court procedure. The person to be called as an assessor may be taken from the list of assessors, or, if there are no suitable nautical assessors listed, he may be chosen by agreement between the parties with the approval of the judge.[28] However, if the county court is to hear a pilotage appeal the judge is required to select and sit with an assessor who has both nautical and pilotage experience, though the parties may still take objection to him either personally or in respect of his qualifications.[29] There are similar requirements when a metropolitan magistrate or a stipendiary magistrate hears a pilotage appeal.

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[22] Currently £12 per day: *Practice Note* (April 23, 1968). Surprisingly this is lower than the fee paid to assessors in county courts, which is currently £15 15s. per day: C.C.R., Ord. 31, r. 5.

[23] Patents Act 1949, ss. 84 (8), 85 (9).

* This article was written before the passing of the Merchant Shipping Act 1970. This Act, which has yet to be brought into force, will reform the law concerning shipping inquiries and investigations referred to in Part I (2) of this article.

[24] County Courts Act 1959, s. 55. "Admiralty jurisdiction" is defined in s. 56.

[25] County Courts (Admiralty Jurisdiction) Order 1966 (S.I. 1966 No. 1547).

[26] County Courts Act 1959, ss. 55 (1), 197 (1); County Courts (Admiralty Jurisdiction) Order 1966 (S.I. 1966 No. 1547).

[27] Administration of Justice Act 1956, s. 2.

Nautical assessors are also specifically required in certain other proceedings. Thus an appeal to a county court sitting as a Court of Survey must be heard by a judge sitting either with two assessors "of nautical, engineering, or other special skill and experience," one of whom is appointed by the Board of Trade and the other by the court registrar from a list provided by the local marine board.[30] Formal investigations of shipping casualties and inquiries into loss of life from a fishing vessel's boat are held by a Wreck Commissioner, or by a court of summary jurisdiction, with the assistance of "one or more assessors of nautical, engineering, or other special skill or knowledge" appointed from a list of persons approved by the Home Secretary and commonly known as the Home Office List.[31] At least two assessors having experience in the merchant service are necessary if the formal investigation may involve the cancellation or suspension of the certificate of a certificated officer,[32] and a court of summary jurisdiction cannot cancel or suspend a certificate unless at least one of the assessors concurs in the finding of the court.[33] An inquiry into the conduct of a certificated officer by a court of summary jurisdiction must be conducted in a manner similar to a formal investigation into a shipping casualty.[34]

The Home Office List of assessors is important not only because it provides the assessors for formal investigations of shipping casualties and inquiries into loss of life from a fishing vessel's boat, but also because it provides a convenient source of nautical assessors, in addition to the Trinity Masters, who may assist the Supreme Court in Admiralty actions. The list is divided into four classes according to the qualification of the assessors, namely, (i) mercantile marine masters, (ii) mercantile marine engineers, (iii) Royal Navy, (iv) persons of fishery, naval architecture or other special skill or knowledge.[35] The list remains in force for three years, though assessors may be reappointed to subsequent lists.[36]

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[28] In the Mayor's and City of London Court Elder Brethren of Trinity House at Deptford Strond are customarily called when nautical assessors are required.

[29] Pilotage Act 1913, s. 28.

[30] Merchant Shipping Act 1894, s. 487 (1), (3). The jurisdiction of the Court of Survey is, in practice, believed to be obsolete.

[31] Merchant Shipping Act 1894, ss. 466 (3), 468. See the Shipping Casualties and Appeals and Re-hearings Rules 1923 (S.R. & O. 1923 No. 752), Appendix, Part II.

[32] *Ibid.*, s. 466 (4). Certificated officers are masters, mates and engineers.

[33] *Ibid.*, s. 470 (1) (*a*).

[34] *Ibid.*, s. 471 (4).

[35] Shipping Casualties and Appeals and Re-hearings Rules 1923 (S.R. & O. 1923 No. 752), Appendix, Part II.

[36] Merchant Shipping Act 1894, s. 467 (1).

In the Supreme Court assessors are only required to be summoned in shipping casualty rehearings and appeals, which are heard before a Divisional Court of the Admiralty Division.[37] In such cases the court must be assisted by at least two assessors selected by the court from either the Elder Brethren of Trinity House or the Home Office List or from both.[38] However, nautical assessors often assist the Admiralty Court and the Court of Appeal in Admiralty appeals from both the High Court and the Admiralty county courts when questions of seamanship and nautical knowledge arise, and when the High Court sits as a prize court assessors may be summoned in similar circumstances.

In the Admiralty Court one or more assessors are summoned to assist the judge as a matter of course in collision and similar "damage" actions, in salvage actions, and in actions in respect of personal injuries or death on board ships and fishing vessels. However, the court may order a trial of such actions without assessors and is likely to if the parties agree that their attendance can be dispensed with.[39] In all other Admiralty proceedings assessors will only be summoned at the request of the parties or by order of the court. An order at the summons for directions will determine whether the trial is to be with assessors [40] and although these are strictly matters for the court,[41] the parties may agree informally among themselves not only whether assessors are required, but also what kind of assessors and even, in exceptional circumstances, who shall fill the office, and then seek the approval of the judge at the hearing of the summons for directions.

The assessors in the Admiralty Court are usually two Elder Brethren of Trinity House,[42] otherwise known as Trinity Masters. The Masters for any case are selected by Trinity House and the choice notified to the Admiralty Registry before each hearing. However, the assessors need not be Trinity Masters, and must not be if Trinity House is a party to the action (*e.g.* if a Trinity House vessel or buoy is involved). Likewise a Trinity Master cannot sit if he has been in the service of any of the parties to the action,[43] although a Trinity Master who is a retired Royal Naval officer may still sit if one of H.M. vessels is involved. In cases where Trinity Masters do not or cannot sit, assessors will generally be drawn from either the Court of Appeal panel of assessors or from the Home Office List. Assessors from the Home Office

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[37] *Ibid.*, s. 475 (3) (*a*), Merchant Shipping Act 1906, s. 66; Shipping Casualties and Appeals and Re-hearings Rules 1923 (S.R. & O. 1923 No. 752), reg. 19.

[38] Shipping Casualties and Appeals and Re-hearings Rules 1923 (S.R. & O. 1923 No. 752), reg. 20 (*e*).

[39] As in *The River Fisher* (1923) 39 T.L.R. 288.

[40] R.S.C., Ord. 75, r. 25 (2).

[41] Judicature Act 1925, s. 98 (1); R.S.C. *loc. cit.*

[42] *i.e.* the Trinity House at Deptford Strond, London. There are other Trinity House corporations at Newcastle and Hull. Trinity Masters may be summoned from the latter corporations in cases where local knowledge of nautical matters is required, as in *The York* [1965] 1 Lloyd's Rep. 97.

[43] *The Bremen* (1931) 47 T.L.R. 505 (C.A.).

List are usual in cases where specialist nautical assessors, such as fishery experts or engineering experts, are required.

Assessors for Admiralty appeals in the Court of Appeal are drawn from the Court of Appeal panel which consists of all the Trinity Masters together with four assessors appointed by the Master of the Rolls for three-year periods, two of whom are mercantile marine assessors nominated by the Honourable Company of Master Mariners (nominees need not be members of the Honourable Company) and two of whom are nominated by the Ministry of Defence from (usually retired) Royal Naval officers. The Master of the Rolls has laid down a *Practice Direction* as to when Admiralty appeals shall be heard with assessors and who shall be summoned.[44]

It is a long-established practice, especially after the question of liability has been decided by the court or agreed upon by the parties for the quantum of damages to be decided upon by the Admiralty Registrar or, more rarely, by a district registrar assisted if necessary by either nautical or other expert assessors or by merchants.[45] The merchants used to be drawn from a panel of merchants from the City of London approved by the President, but during this century the assistance of merchants has been sought with lessening frequency and their attendance is now unknown.

The Prize Court may call upon one or more Trinity Masters or other assessors to advise on any matters requiring nautical or other professional knowledge.[46] However, should the court sit again, the present rules, which were made at the commencement of the Second World War, may well be altered.

The House of Lords may summon two nautical assessors to assist them in Admiralty appeals, either upon or without an application by any party. Both assessors are chosen by the Lord Chancellor, one from a list of Royal Naval officers, either active or retired, furnished by the Deputy Under-Secretary of State (Naval), and the other from a list of Elder Brethren of Trinity House.[47] The Judicial Committee of the Privy Council may also summon two nautical assessors to advise at the hearing of appeals from the Prize Court and the Court of Admiralty of the Cinque Ports,[48] and at the hearing of Admiralty and Prize appeals from colonies and other territories from which appeals still lie to the Privy Council.[49]

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[44] *Practice Direction* [1965] 2 All E.R. 504.

[45] See Kenneth C. McGuffie *et al.*, *British Shipping Laws*, Vol. 1, *Admiralty Practice*, paras. 1261–1268, 1271. A county court registrar may assess damage in Admiralty actions but cannot award salvage: C.C.R., Ord. 35, rr. 50–51.

[46] Prize Court Rules 1939, Ord. 16.

[47] Supreme Court of Judicature Act 1891, s. 3; Orders of the House made on May 10 and 18, 1892, November 20, 1894, and March 18, 1919; House of Lords Direction as to Procedure No. 28 (1968).

[48] This court, though still extant, has not sat since 1902. Salvage Commissioners of the Cinque Ports, who also no longer function, may similarly be assisted by nautical assessors.

[49] Judicial Committee of the Privy Council Rules 1957 (S.I. 1957 No. 2224), r. 78.

PART II. THE FUNCTION AND PRACTICE OF ASSESSORS

Assessors do not, in the modern sense of the word, assess anything. The title of the office derives directly from the latin *assessor*, meaning one who sits with another, or an assistant, and in English law denotes a person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an expert.[50]

Although most of the cases on the function of assessors concern nautical assessors in Admiralty proceedings, the rules they lay down apply to assessors generally, for the function of assessors, unless modified by statute,[51] is the same irrespective of the nature or status of the court or tribunal they may be assisting. References in cases to the function of nautical assessors may therefore be understood to apply generally to all assessors in relation to their own special skill or knowledge. What may differ, however, is the practice of different kinds of assessors, that is, the way in which they exercise their functions.

In some respects the function of assessors is similar to that of expert witnesses in that they are sources of information on matters concerning their own special skill or knowledge. Assessors, however, are not called by the parties, are not sworn, and cannot be cross-examined.[52] Indeed their advice is both sought by and given to the court in private and is only disclosed to the parties at the court's discretion and then usually at the end of the case in the judgment.

The similarity between assessors and expert witnesses has often led judges to refer to assessors as witnesses and to their advice as evidence. This practice was strongly criticised by Viscount Simon L.C. in *Richardson* v. *Redpath, Brown & Co. Ltd.*,[53] one of the very few House of Lords cases concerning non-nautical assessors, in this case medical assessors. He said[54]:

> "To treat . . . any assessor, as though he were an unsworn witness in the special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence."

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[50] See *The Magna Charta* (1871) 1 Asp.M.L.C. 153, 154 (P.C.); *The Beryl* (1884) 9 P.D. 137, 141 (C.A.).

[51] Under the Ecclesiastical Jurisdiction Measure 1963, s. 28 (e), assessors in a Consistory Court perform the same function as a jury. In no common law court do assessors perform such a function.

[52] See *The Queen Mary* (1947) 80 Ll.L.Rep. 609, 612 (C.A.). Although assessors are not sworn, deliberately to tender false advice would probably constitute a criminal contempt of court. *Cf.* court experts who are also not called by the parties but who are sworn and can be cross-examined.

[53] [1944] A.C. 62.

[54] *Ibid.* at p. 70.

He then went on to disapprove of judges' referring to the advice of assessors as "evidence" and to approve the definition of an assessor's function as being not to supply evidence but to help the judge understand the evidence.[55]

However, this view, with respect to Viscount Simon, is undoubtedly too restrictive in confining the role of assessors to the interpretation and elucidation of technical evidence. Although the advice sought from assessors in any court may only concern the meaning of technical evidence, assessors may properly be required to answer any question of fact within their special skill or knowledge that is relevant to the case. Indeed, in the leading House of Lords case concerning the function of assessors, *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia*,[56] Viscount Dunedin said, "Assessors may be used to the full for information,"[57] and Lord Sumner said of assessors in the same case, "They are not only technical advisers; they are sources of evidence as to facts."[58] A similar statement was made in the Court of Appeal in *The Clan Lamont*.[59] Scott L.J., delivering the judgment of the court in that case, said[60]: "In arriving at that conclusion we attach the greatest weight to the expert advice which has been given to us by our [nautical] assessors—and that advice, it should be remembered, is expert evidence, admissible in Admiralty Courts, on all issues of fact about seamanship."

This wider view, that assessors may assist the court by advising on any matter within their competence, is supported by the rule that expert evidence is inadmissible on matters within the special skill or experience of the assessors assisting the court. The application of this rule, which was laid down by Dr. Lushington in the High Court of Admiralty in the first half of the nineteenth century,[61] arose in the more recent case of *Saul* v. *St. Andrew's Steam Fishing Co. Ltd., The St. Chad*,[62] an action for damages for personal injury sustained by the plaintiff on board the defendant's fishing trawler. Although a fishery assessor was to assist the Admiralty Court in this case, each side wished to call an expert witness concerning the use of the automatic steering gear used on the trawler, as such a new development might be outside the practical experience of the assessor, and at the hearing of the summons for direction an order was made allowing each side to call an experienced trawler skipper to give evidence about the system of work in that type of trawler.[63]

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[55] *Ibid.* at pp. 70–71.

[56] [1927] A.C. 145.

[57] *Ibid.* at p. 150.

[58] *Ibid.* at p. 152.

[59] (1946) 79 Ll.L.Rep. 521.

[60] *Ibid.* at p. 524.

[61] In *The Gazelle* (1842) 1 Wm.Rob. 471, 474; 166 E.R. 648, 649 and *The Ann and Mary* (1843) 2 Wm.Rob. 189, 197; 166 E.R. 725, 728. As has already been noted, Elder Brethren of Trinity House are experts in all matters of navigation and seamanship: *The Clan Lamont* (1946) 79 Ll.L.Rep. 521, 524 (C.A.).

[62] [1965] 2 Lloyd's Rep. 1 (C.A.).

[63] See *ibid.* at p. 4n.

The case reached the Court of Appeal, where the propriety of allowing the admission of such evidence was questioned by Willmer L.J., who expressed surprise that such an order had been made, and said: "I had always understood that, where the Court is advised by an Assessor, it is not competent to call expert evidence in relation to matters on which the Assessor is supposed to advise the Court."[64] It should be noted that Willmer L.J. did not in that case hold such evidence to be inadmissible and it may be held in the future that expert evidence may be called concerning matters of which the assessors have no experience or knowledge. Until then a better practice may be for the judge only to allow the admission of such evidence with the approval of his assessors, as in *Neptun (Owners) v. Humber Conservancy Board*,[65] in which Langton J. admitted the evidence of an expert hydrographer by agreement with his nautical assessors as such evidence "would be likely to add to their own personal knowledge of the subject."[66]

What matters are within the competence of the assessors is a matter for the judge with whom they are sitting. He will, no doubt, confer with them on this point if he is in any doubt, but examples are not unknown of judges refusing evidence because it is deemed to be a matter of skill or knowledge within the competence of the assessors present, although it was very probable that the assessors had no specific knowledge of such matters. Thus in *The Assyrian*,[67] a damage to cargo action, shipowners sought leave of the Court of Appeal to call evidence to show that a particular screw alley did not smell in order to rebut the finding of the trial judge, arrived at on the advice of his nautical assessors, that all screw alleys might emit smells and thus damage sensitive cargo. Lord Esher M.R. said that that matter was one of nautical skill and that as evidence cannot be given at all on such matters when the court is assisted by nautical assessors, leave would be refused.

The role of an assessor is thus quite different both from that of a judge and that of a jury. In Admiralty actions juries are never in practice called whether assessors are summoned to assist the court or not.[68] The judge must therefore decide all the issues, both of law and fact, himself.[69] Indeed judges have been criticised by appellate courts for not recognising that the tribunal that has to try the case is the judge himself and that the assessors who assist him should take no part in the judgment whatever.[70] Sir Joseph Napier stated the position clearly in *The Magna Charta*[71] when, considering the role of nautical assessors in the High Court of Admiralty, he said[72]:

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[64] *Ibid.* at p. 4. However, Willmer L.J. also said that expert evidence given by the court below must be considered by the Court of Appeal (*loc. cit.*). In the Admiralty Court Sir Jocelyn Simon P. had said: "I doubt the value of expert evidence when the Court has the advantage of a Nautical Assessor" [1965] 1 Lloyd's Rep. 107, 109.

[65] (1937) 59 Ll.L.Rep. 158.

[66] *Ibid.* at p. 167.

[67] (1890) 63 L.T. 91; 6 Asp.M.L.C. 525.

[68] In Admiralty proceedings in a county court a jury cannot be called (County Courts Act 1959, s. 94 (1) (*a*)); in Admiralty proceedings in the High Court a jury may in theory be called if there are special circumstances (R.S.C., Ord. 75, r. 25 (3)). *Cf.* Patents Act 1949, s. 84 (4).

[69] *The City of Berlin* [1908] P. 110, 118 (C.A.).

> " [The judge] is advised and assisted by persons experienced in nautical matters, but that is only for the purpose of giving him the information he desires upon questions of professional skill, and having got that information from those who advise him, he is bound in duty to exercise his own judgment, and it would be an abandonment of his duty if he delegated that duty to the persons who assisted him. The assessors merely furnish the materials for the court to act upon, and, for convenience sake, they are allowed to hear all the evidence."

Assessors, therefore, have nothing to do with the credibility of witnesses, unless that credibility depends upon a knowledge of nautical affairs specially,[73] nor have they anything to do with the weight or balance of evidence.[74] *A fortiori* assessors should not be asked questions which are tantamount to asking them to decide the issue.[75]

Naturally great weight should be given by the courts to the opinions of their assessors, and Brett M.R. even went so far as to say that it would be impertinent in a judge not to consider their opinion as " almost binding,"[76] but nevertheless each court has a duty to make up its own mind both on questions of nautical skill and on the value of the advice given on these matters.[77] It is not at all unknown for judges to disagree with and refuse to follow the advice tendered by their assessors,[78] as may happen, for example, when they feel that the assessors' standards are too high,[79] though it has been recommended in the House of Lords that if a court decides not to follow its assessors' advice it should give reasons for so doing.[80] Assessors may, of course, disagree among themselves as to what advice to give the judge on any point and then the judge must make up his own mind which advice to follow.[81] If he cannot, the point must be taken as not proven.[82]

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[70] *The Beryl* (1884) 9 P.D. 137, 141 (C.A.). And see *The Koning Willem II* [1908] P. 125, 137–138 (C.A.).

[71] (1871) 1 Asp.M.L.C. 153 (P.C.).

[72] *Ibid.* at p. 154. And see *The Aid* (1881) 6 P.D. 84, 86; *S.S. Gannet (Owners)* v. *S.S. Algoa (Owners)*, *The Gannet* [1900] A.C. 234, 235–236 (H.L.).

[73] *The Beryl* (1884) 9 P.D. 137, 141 (C.A.).

[74] *Ibid.*, *S.S. Gannet (Owners)* v. *S.S. Algoa (Owners)*, *The Gannet* [1900] A.C. 234, 235–236 (H.L.).

[75] *Lords Commissioners of the Admiralty* v. *S.S. Ausonia (Owners)* (1920) 2 Ll.L.Rep. 123, 124 (H.L.); *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners)*, *The Australia* [1927] A.C. 145, 150 (H.L.).

[76] *The Beryl* (1884) 9 P.D. 137, 141 (C.A.).

[77] *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners)*, *The Australia* [1927] A.C. 145, 153 (H.L.); and see *The Beryl* (1884) 9 P.D. 137, 141 (C.A.); *The Llanelly* (1926) 25 Ll.L.Rep. 87, 89 (H.L.).

[78] *e.g.* as in *The Spero* (1948) 81 Ll.L.Rep. 350, 354; *The Marinegra* [1959] 2 Lloyd's Rep. 65, *per* Willmer L.J. (C.A.).

[79] *e.g.* as in *The British Resource* (1941) 70 Ll.L.Rep. 93 (C.A.); *The Carrick Coast* (1948) 81 Ll.L.Rep. 447.

[80] *The Llanover* (1945) 78 Ll.L.Rep. 461, 469. And see E. R. Hardy-Ivamy, " Nautical Assessors in Collision Actions " (1961) 111 L.J. 164, esp. at p. 166.

The precise mode of making use of assessors rests in the discretion of each court.[83] However, the judge may not request or permit an assessor to exceed the bounds of his function, which is solely to advise. Thus assessors may not, for example, perform experiments or inspect a person or property unless statute so provides.[84] Nor may they put questions directly to witnesses, although in *Richardson* v. *Redpath, Brown & Co. Ltd.*, Viscount Simon L.C. said: " [An assessor] may, in proper cases, suggest to the judge questions which the judge himself might put to an expert witness with a view to testing the witness's view or to making plain his meaning." [85] In an earlier case considered by the Court of Appeal, *Lewis* v. *Port of London Authority*,[86] Cozens-Hardy M.R. mentioned in the course of his judgment that during the original proceedings a medical assessor had put questions directly to medical experts. Cozens-Hardy did not express an opinion on the propriety of such actions, though it is clearly improper, especially after the judgment in *Richardson* v. *Redpath, Brown & Co. Ltd.* By merely suggesting to the judge questions which the judge might put to the witnesses the assessor may still be considered to be advising, for the discretion as to whether, and in what manner, to put the questions remains with the judge.

It has been recommended in judgments from the House of Lords that, whenever possible, questions should be put to assessors, and their answers received, in writing, as the questions and answers would then be available to an appellate court in case of an appeal.[87] This is now the general practice in the Court of Appeal, where the issues are clearly defined. In a court of first instance, however, where the consultation between judge and assessors is informal and frequent, advice is usually sought and given orally. Both forms of procedure mean that the parties may be left in ignorance of the advice being sought and tendered, though Viscount Simon has said: "It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice he has received." [88] The judge will usually refer to the questions he has put to his assessors and the answers he has received in the course of his judgment, and if these were put in writing they may be set out verbatim. Yet even when the advice of assessors has been submitted in writing, the parties have no right to see this advice or have copies for the purpose of an appeal.[89]

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[81] *e.g.* as in *The Taiwan* (1947) 80 Ll.L.Rep. 580, 585–586. In *The Granton* (1880) 70 L.T.J. 63, the two assessors were unable to agree on the cause of a collision and the judge disagreed with both of them; he therefore ordered a new trial.

[82] *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia* [1927] A.C. 145, 153 (H.L.).

[83] *Ibid.* at p. 153. And see R.S.C., Ord. 33, r. 6.

[84] Thus in Admiralty actions in the Supreme Court the court may, on the application of any party, make an order for the investigation by the assessors of any ship or other property, whether real or personal (R.S.C., Ord. 75, r. 28). For other powers of inspection given to assessors, see the Merchant Shipping Act 1894, s. 488 (2); Landlord and Tenant (War Damage) Act 1939, s. 23 (3) (a); Landlord and Tenant Act 1954, s. 63 (6) (a); Coal-Mining (Subsidence) Act 1957, s. 13 (6) (a). *Cf.* the powers of a scientific adviser under the Patents Act 1949, s. 84 (2), R.S.C., Ord. 103, r. 27. Assessors at formal investigations of shipping casualties and inquiries into loss of life from a shipping vessel's boat must either sign the final report or state in writing their reasons for disagreeing therefrom (Merchant Shipping Act 1894, ss. 466 (7), 468).

[85] [1944] A.C. 62, 70 (H.L.).

[86] (1914) 111 L.T. 776, 778.

[87] *S.S. Melanie (Owners)* v. *S.S. San Onofre (Owners), The Melanie (No. 1) (1919)* [1927] A.C. 162n., 164 (H.L.); *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia* [1927] A.C. 145, 153 (H.L.).

An appellate court may make full use of the advice given by assessors in the court below, and will obtain this either from the judgment or, if it were given in writing, from the original statements.[90] Thus if an appellate court is assisted by its own assessors it may consider both their advice and that of the assessors of the court below. The resulting situation has been pertinently described by Scrutton L.J. concerning an appeal from the Admiralty Court to the Court of Appeal [91]:

> "It is necessary to point out that the four assessors are a very peculiar sort of witness. The judge in the Admiralty Court talks to them, and gets information from them. The parties do not know what the witnesses are telling the judge; they have no opportunity of cross-examining the so-called witnesses. Indeed, in the Admiralty Court, the practice is not followed which we—in obedience to the direction of the House of Lords—follow, the practice of asking questions in writing, and obtaining answers in writing, and sending them up to the superior Court. We do not know the terms of the questions except from what the learned judge says in his judgment. One starts, therefore, with two witnesses whose evidence the parties do not hear, and whom the parties have no opportunity of cross-examining, and the case then comes to this Court, and we have to decide the case with two witnesses whom the judge below did not hear."

Similarly, when a case which has been heard with assessors reaches the House of Lords, the Law Lords may use not only the advice of their own assessors, but also the advice given by the assessors in the Court of Appeal and in the court of first instance.

As there is no hierarchy of assessors, an appellate court does not have to pay more attention to its own assessors than it does to those of the court below. The assessors in an appellate court are simply in addition to those previously consulted.[92] It is therefore open to the Court of Appeal, in considering the totality of advice available, to reject the advice tendered by its own assessors in favour of that given by the assessors in the court below.[93] The equal status and the advisory function of assessors also precludes an appeal from the advice of the assessors in one court to the assessors of an appellate court. In *S.S. Melanie (Owners)* v. *S.S. San Onofre (Owners), The Melanie (No. 1)*,[94] Lord Birkenhead L.C. said, " It would, I think, be intolerable if . . . appeals were treated as being not from one judge to another but from one assessor to another," [95] and the phrase " an appeal from assessors to assessors " was explained, and its implications criticised, by Lord Sumner in *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia*, in which he said [96]:

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[88] *Richardson* v. *Redpath, Brown & Co. Ltd.* [1944] A.C. 62, 71 (H.L.).

[89] *The Banshee* (1887) 6 Asp.M.L.C. 130 (C.A.). But if the statute enables assessors to inspect property, etc., any report they make may have to be made known to the parties; see, *e.g.* C.C.R., Ord. 40, r. 13 (4).

[90] *Ibid.*, *Hattersley & Sons Ltd.* v. *George Hodgson Ltd.* (1905) 21 T.L.R. 178 (C.A.).

[91] *The Tovarisch* [1930] P. 1 7.

> " Strictly it is a figure of speech, for there is no such thing as an appeal either from or to assessors. It is really a criticism of the conduct of one court or of both courts below. It specially describes the effect on an appeal, when an appellate tribunal adopts a certain attitude towards its assessors, an attitude which is equally open to criticism in a court of first instance. That attitude is the Court's surrender to the assessors of the judicial function of itself deciding the issue, however technical it may be."

Although the function of assessors is solely to give advice, the value of their role should not be under-estimated. Indeed, it is unfortunate that the advantages of obtaining expert information from assessors rather than by the examination of experts in the witness-box are not more widely recognised, especially by the traditional common law courts. Perhaps when a definitive study is made into either the role of the layman in the judicial process or methods of providing evidence the value of assessors will be more generally acknowledged.

ANTHONY DICKEY.*

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[92] *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia* [1927] A.C. 145, 151 (H.L.); *The Sobieski* (1948) 82 Ll.L.Rep. 370, 379 (C.A.); *The Fina Canada* [1962] 2 Lloyd's Rep. 445, 454–455 (C.A.); *Saul* v. *St. Andrew's Fishing Co. Ltd., The St. Chad* [1965] 2 Lloyd's Rep. 1, 6 (C.A.).

[93] As the Court of Appeal did in *The Sobieski* (1948) 82 Ll.L.Rep. 370.

[94] (1919) [1927] A.C. 162n., approved in *S.S. Artemisia (Owners)* v. *S.S. Douglas (Owners), The Artemisia* (1925) [1927] A.C. 164n. (H.L.) and in *S.S. Australia (Owners)* v. *S.S. Nautilus (Cargo Owners), The Australia* [1927] A.C. 145 (H.L.).

[95] [1927] A.C. at p. 163.

[96] [1927] A.C. 145, 151–152.

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INNOVATION AND CONTINUITY IN THE LAW OF TREATIES

THE adoption by the Vienna Conference of the Convention on the Law of Treaties [1] marked the culmination of twenty years' work in the development of international law. It was at its first session in 1949 that the International Law Commission, established by the General Assembly to implement Article 18 of the United Nations Charter [2] and charged under its statute with the task of "the progressive development of international law and its codification," [3] included the law of treaties in its list of topics suitable for codification.[4]

From 1949 until the adoption of the final text of its draft articles on the law of treaties in 1966, the work of the International Law Commission was marked by at least the appearance of continuity. It was based, like its work on other topics, on reports prepared by special rapporteurs, on lengthy deliberations within the Commission, and on the observations of Governments on drafts provisionally approved by the Commission, which were then revised in the light of these observations. The Commission's somewhat protracted method of work, necessary if the final product was to be accepted by governments, of itself ensured an element of continuity and stability. A further element of continuity was afforded by the fact that the successive special rapporteurs on the law of treaties were all British: Mr. J. L. Brierly, Mr. (later Sir Hersch) Lauterpacht, Sir Gerald Fitzmaurice, and Sir Humphrey Waldock.

In reality, however, the period was one of immense change, and it is perhaps the main achievement of the Commission that its own work has been fully responsive to the developments in international law and in international relations throughout this period. The principal change in the international community itself, the emergence of the new independent states, has influenced the form of the Commission's work as well as its content. This influence has been expressly acknowledged in the Commission's reports. Thus, while it was at first envisaged that the work on the law of treaties would lead, like that on other subjects,[5] to the preparation of a draft convention, which might then be adopted by a diplomatic conference, subsequently Sir Gerald Fitzmaurice, who presented five successive reports from 1956 to 1960, framed his draft articles in the form of an expository code.[6] One of the arguments advanced in support of this approach was that it was inappropriate that a code on the law of treaties should itself take the form of a treaty. In 1961, however, the Commission decided that its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention.[7] Among the reasons given for this decision were that the consolidation of the law of treaties was of particular importance when so many states had recently become members of the international community and that the codification of the law of treaties through a multilateral convention would give all the new states the opportunity to participate directly in the formulation of the law if they so wished.[8]

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[1] The Convention was adopted by the U.N. Conference on the Law of Treaties on May 22, 1969, by a vote of 79 in favour, one against (France), with 19 abstentions. For the text of the Convention, see Cmnd. 4140; (1969) 63 *American Journal of International Law* 875; and (1969) 8 *International Legal Materials* 679.

[2] Art. 13 (1) of the Charter provides that "The General Assembly shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." The International Law Commission was established by General Assembly resolution 174 (II) of November 21, 1947.

[3] Statute of the International Law Commission, Art. 1.

[4] Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925), para. 16.

The Commission's estimate of the attitude of the new states to international law must have struck many observers as wildly optimistic. In the event, however, their contribution to the Vienna Conference, referred to below, more than justified the Commission's decision.

The preference for a convention rather than a code had, however, a further justification which was not expressly referred to by the Commission. It made it possible for the draft articles formulated by the Commission to be more radical than would otherwise have been possible. The Commission has never regarded the "progressive development" of international law as being a separate function from that of its codification.[9] Indeed, it is doubtful whether the two functions are, in many fields of international law, truly separable. The law is too fluid. But in its work on the law of treaties the Commission has taken the process of progressive development further than any of its previous work; and this development has been assisted by the states themselves.

Three areas of the law of treaties which illustrate the process of change are considered in this article: treaties and constitutional law; treaties and the use of force; and the effects of breach.[10]

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[5] Notably its work on the law of the sea, leading to the adoption at Geneva on April 29, 1958, of four Conventions on the Law of the Sea (Cmnd. 584); and its work on diplomatic and consular relations, leading to the adoption at Vienna on April 18, 1961, and April 24, 1963, respectively, of the Vienna Convention on Diplomatic Relations (Cmnd. 1368) and the Vienna Convention on Consular Relations (Cmnd. 2113).

[6] *Yearbook of the International Law Commission* (cited below as *Yearbook*), 1956, Vol. II, p. 104; 1957, Vol. II, p. 16; 1958, Vol. II, p. 20; 1959, Vol. II, p. 37; and 1960, Vol. II, p. 69.

[7] *Yearbook*, 1961, Vol. II, p. 128, para. 39.

[8] *Yearbook*, 1962, Vol. II, p. 160, para. 17.

[9] *Cf.* Briggs, *The International Law Commission* (1965), pp. 129 *et seq.*, 276 *et seq.*

[10] For the proceedings of the Vienna Conference on certain other topics (reservations to multilateral conventions, the interpretation of treaties, and *jus cogens*),

TREATIES AND CONSTITUTIONAL LAW[11]

According to the traditional doctrine, a treaty concluded by a state's representatives is invalid if it exceeds their competence under the constitutional law of the state; the rationale of the rule is that there is no real consent by the state concerned. Such a treaty, according to Oppenheim,[12] is voidable at the option of that state. Despite his recognition that such a rule might jeopardise the security of international transactions, despite his acknowledgment that a negotiating party could not be expected to adjudicate on the complexities of another state's constitutional law, Oppenheim reiterated in absolute terms the principle that such treaties concluded by heads of states, or other organs acting on behalf of the state, as violated constitutional limitations, do not bind the state concerned.

It was sometimes possible, however, to mitigate the full rigour of the "constitutionalist" doctrine without violating the underlying principle. The notion of good faith could be invoked, for example, to preclude a state from alleging the invalidity of a treaty on which it had itself relied. Or the narrower concept of estoppel might be used where the other state had acted to its detriment on the assumption that the treaty was valid. Above all, the strict requirements of constitutional law might be replaced by the looser constitutional practice, as in the case of agreements made in simplified form, which required neither "full powers"[13] nor ratification.

The substance of the constitutionalist doctrine was accepted by the first special rapporteur, Brierly, whose first draft in 1950 provided only that the capacity of a state to make treaties may be exercised by whatever organ or organs of that state its constitution may provide; and that in the absence of provision in its constitution to the contrary, the capacity was deemed to reside in the head of state.[14] The rule was justified in the Commentary on the ground of "the prevalence and notoriety of provisions in the constitutions of states regulating the making of treaties"[15]; this argument, however, was to lose any force it then had, with the appearance on the international scene of a large number of new states with rapidly changing political structures. Following the constitutionalist doctrine, Brierly's third report in 1952 proposed the following text:

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see Sinclair, "Vienna Conference on the Law of Treaties" (1970) 19 I.C.L.Q. 47.

[11] See generally Wildhaber, "Provisions of Internal Law Regarding Competence to Conclude a Treaty" (1967) 8 *Virginia Journal of International Law* 94.

[12] Oppenheim, *International Law*, Vol. I (8th ed., Lauterpacht, 1955), pp. 887 *et seq.*

[13] The term "full powers" is defined by Art. 2 (1) (c) of the Vienna Convention as "a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty." References to treaties in simplified form occurring in earlier draft articles of the International Law Commission were eliminated in the final draft.

[14] *Yearbook*, 1950, Vol. II, p. 228, art. 4.

[15] *Op. cit.*, p. 231.

"A treaty becomes binding in relation to a state by signature, ratification, accession or any other means of expressing the will of the state, in accordance with its constitutional law or practice through an organ competent for that purpose." [16]

The doctrine was significantly qualified in 1953 by Lauterpacht as Brierly's successor. Lauterpacht's draft provided that a treaty was voidable (rather than void *ab initio*), if it had been entered into in disregard of the limitations of a state's constitutional law and practice, at the option of that state alone [17]; the invalidity of the treaty could not be asserted by any other state. The right to assert invalidity on this ground was further qualified; thus, a contracting party might, under certain circumstances, be deemed to have waived its right [18]; a state was to be held responsible for any damage caused to another party [19]; and provision was made for compulsory jurisdiction, in cases where the right was claimed, by an international tribunal.[20]

The draft was still open to criticism, however, on several grounds. The provision for compulsory jurisdiction seemed unlikely to find acceptance among states; the measure of damages, if the principle of state responsibility was accepted, would be hard to determine; and despite these safeguards the constitutionalist doctrine with its attendant disadvantages remained.

A fresh start was made in 1956 by Fitzmaurice. Basing his view on a number of writers [21] as well as his own experience in the Foreign Office, he argued that, as a matter of international law, the constitutional law and practice of states were quite irrelevant.[22] On this view, international law leaves it to each state to determine the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. Here, the treaty-making power is the function of the competent executive authority, and a state which has performed the necessary acts through its executive authority cannot later deny their international validity. Accepting this view, the draft articles finally adopted by the International Law Commission in 1966 provided that for the purpose of performing all acts relating to the conclusion of a treaty, Heads of State, Heads of Government, and Ministers for Foreign Affairs are considered as representing their state, in virtue of their functions and without having to produce full powers [23]; and further provided that: "A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation of its internal law was manifest." [24] At the Vienna Conference, a further restriction was introduced: a state may only invoke a violation if the rule of internal law was one of fundamental importance.[25]

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[16] *Yearbook*, 1952, Vol. II, p. 51, art. 4.

[17] *Yearbook*, 1953, Vol. II, p. 141, art. 11 (1).

[18] Art. 11 (2).

[19] Art. 11 (3).

[20] Art. 11 (5).

[21] Anzilotti, Scelle, Kelsen; *cf.* Fitzmaurice himself, 15 *British Year Book of International Law* (1934), p. 129.

[22] *Yearbook*, 1956, Vol. II, p. 108.

[23] *Yearbook*, 1966, Vol. II, p. 178, art. 6 (2).

The increasing restrictions to which the right to invoke a violation of constitutional law was made subject, the narrow scope of the rule finally adopted, and its significantly negative formulation, are a striking illustration of the progressive tendency to limit the right of a state to assert the invalidity of a treaty. The developments within the Commission were, it is true, parallel to a similar evolution in juristic doctrine. It is significant, however, that the trend was further strengthened by the Conference itself, evidently concerned with the security of international transactions. The Conference also strengthened the procedural safeguards proposed by the International Law Commission.

Article 65 of the Convention lays down a procedure to be followed in all cases where a state invokes either a defect in its consent or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation. In all these cases, the state concerned must give notice (normally three months) to the other parties of its claim and of the measures it proposes to take: if any other party raises an objection, the parties must seek a solution in accordance with Article 33 of the United Nations Charter, which lists the various means for the peaceful settlement of disputes.

More novel, however, is Article 66 of the Convention, introduced at the Conference itself, largely at the initiative of a group of African and Asian delegations led by Nigeria.[26] This Article lays down the procedure to be followed if no solution has been reached twelve months after the objection was raised. Any party to the dispute may set in motion the procedure for conciliation which is provided for in the Annex to the Convention. This is so drafted that a conciliation commission may be set up without the co-operation of any other party to the dispute, although obviously some co-operation will be necessary if it is to fulfil its function.

Special provision is made for the settlement of disputes relating to "peremptory norms of general international law" (*jus cogens*). Article 53 provides that a treaty is void if it conflicts with a peremptory norm of general international law; an uncontroversial example might be an agreement to commit aggression against a third state. Influenced no doubt by the uncertain extent of the rules of *jus cogens*, and the fact that Article 64 recognises that new rules of

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[24] *Op. cit.*, p. 16, art. 43.

[25] Art. 46 (1) of the Convention; at the same time, the term "manifest" was defined to make it clear that the question must be judged objectively: Art. 46 (2).

[26] Sinclair, *op. cit.*, p. 69.

jus cogens may emerge in the future, the Conference decided that any party to a dispute relating to these two Articles may submit it to the International Court of Justice. Parties to the Convention will therefore in effect be accepting directly, and not as in the case of other conventions through an optional protocol, compulsory judicial settlement of a limited but important class of disputes.

TREATIES AND THE USE OF FORCE

The effect of coercion is dealt with by two brief Articles in the Convention; the juxtaposition of these Articles reflects in the most striking manner the development of the attitude of international law to the use of force. Article 51 of the Convention provides that the expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. Article 52 reads as follows: " A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

The former Article, dealing with coercion of a representative of a state, expresses a classical doctrine of international law. If the state's representative was subjected to coercion or duress, his act could not represent the true will of the state; there was thus no consent, and no treaty. Article 52, on the other hand, dealing with coercion of the state itself, contains a rule of recent origin; a rule which is also in the interests of the smaller and newer states.

So long as war was regarded as a natural and legitimate instrument of policy, its effects were necessarily recognised as legally valid. Even when an attempt was made to limit or outlaw aggression, as under the League Covenant and the Kellogg-Briand Pact, states did not always draw the conclusion that situations resulting from aggression should not be recognised; and since the law cannot lag too far behind the facts, in those cases where recognition was refused, it often proved only to have been deferred.[27] Even after the Second World War, when a number of states repudiated treaties which had been concluded under the threat of force, there appears to have been no general acceptance of the view that the customary law had been modified.[28] Under the United Nations Charter, however, with its broadly framed prohibition of the use of force,[29] purporting to extend even to non-members,[30] and its expressed supremacy over all other international agreements,[31] the old rule could hardly stand.

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[27] Rousseau, *Principes Généraux du Droit International Public*, I (1944), p. 349.

[28] Brownlie, *International Law and the Use of Force by States* (1963), p. 405.

[29] Art. 2 (4).

[30] Art. 2 (6).

[31] Art. 103.

Initially, Lauterpacht proposed that treaties imposed in violation of the principles of the Charter should be invalid if so declared by the International Court of Justice at the request of any state.[32] Fitzmaurice, however, while recognising the existence of the new view, considered the arguments against it conclusive; his draft admitted only duress against a representative as rendering a treaty invalid.[33] Waldock's draft acknowledged that the use of force against a state might invalidate a treaty, but provided that a state which had been coerced into entering a treaty should have the option of avoiding it, denouncing it, or, if it so wished, affirming it.[34] In the view finally adopted by the Commission, however, such a treaty is simply void.

The drafting of the rule raised an important temporal problem. Although the Convention has of course no retroactive application, and indeed is expressed to apply only to treaties concluded by states after its entry into force with regard to those states,[35] the question arises as to the date from which the rule should be considered as in force. In formulating the rule, the Commission tried to steer a middle course [36]: on the one hand, it recognised the illogicality of treating the rule as applicable only from the date of the conclusion of a convention on the law of treaties; on the other hand, it did not consider the rule as sufficiently established before the era of the United Nations Charter. Clearly the rule could not be given retroactive effect so as to invalidate treaties concluded before the modern law was established. In accordance with the principle that "a juridical fact must be appreciated in the light of the law contemporary with it," [37] the validity of a treaty must be assessed in the light of the law in force at the time of its conclusion. In so far as it remains executory, however, it would seem that subsequent developments in the law may render it void; for Article 64 of the Convention provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." The Commission finally proposed that a treaty should be void if its conclusion has been procured by the threat or use of force "in violation of the principles of the Charter of the United Nations," [38] thus recognising that the modern law applies to all treaties concluded since the entry into force of the Charter. Even here, however, there is a risk, if not of illogicality, at least of arbitrariness, in the selection of a particular date, since it is arguable that it was not the entry into force of the Charter, on October 24, 1945, which gave the new rule its authority, but rather the gradual acceptance, in word if not always in deed, of the principles contained in the Charter; such acceptance was partly prior, partly subsequent to the date of its entry into force. The wording finally adopted by the Vienna Conference, which refers to " the principles of international law embodied in the Charter of the United Nations," may for this reason be regarded as an improvement on the draft of the Commission. The Commission, referring to a " violation of the principles of the Charter " rather than a " violation of the Charter," intended to make it clear that the rule was not confined to members of the United Nations; the formulation adopted by the Conference incidentally makes this still more explicit. Finally, whereas the Commission's draft, although not conceived with this intention, was arguably restricted to the " Principles " enumerated in Article 2 of the Charter, the formulation adopted by the Conference is wide enough to cover any rule in the Charter which can be said to embody a principle of international law.

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[32] *Yearbook*, 1953, Vol. II, p. 147, art. 12.

[33] *Yearbook*, 1957, Vol. II, p. 56; 1958, Vol. II, p. 38.

[34] *Yearbook*, 1963, Vol. II, p. 51, art. 12.

[35] Art. 4.

[36] *Yearbook*, 1966, Vol. II, p. 247.

[37] Island of Palmas arbitration, *Reports of International Arbitral Awards*, Vol. II, p. 845.

[38] *Yearbook*, 1966, Vol. II, p. 183, art. 49.

BREACH

According to the traditional doctrine, any violation of a bilateral [39] treaty, while it did not automatically terminate the treaty, gave the other party the unconditional right to repudiate the treaty by its own unilateral act. It did not matter whether the violated provision lay at the root of the treaty or not, nor how significant the violation might be; there was no requirement of proportionality between the extent of the violation and the reaction of the other party, no question of the separability of treaty provisions, and no suggestion that the right of termination might be subject to any procedural requirements. This doctrine was accepted even by modern writers without substantial qualification, and was not seriously questioned prior to the deliberations of the International Law Commission.

In this branch of the law of treaties, the principle *pacta sunt servanda* embodies a paradox. On the one hand, it requires that the innocent party should be protected against the violation of a treaty obligation. On the other hand, experience has shown that it is all too easy for a state to allege a breach by the other party as a pretext for denouncing a treaty. The difficulty is to prevent such abuse while preserving the rights of the victim of a genuine violation; and this can be achieved only by a considerable modification of the traditional rule.

A draft presented by Fitzmaurice went some way in this direction: it proposed that the right to terminate a treaty in the event of violation by the other party should be restricted to cases of essential breach; in the case of a lesser breach, the innocent party should be entitled only to suspend it.[40] The final draft, however, which was adopted in Article 60 of the Convention, provides only that a " material breach " of a bilateral treaty entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. A material breach is defined by the same Article as consisting in " (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty." It follows that any lesser breach will not entitle the other party even to suspend the operation of the treaty.[41]

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[39] The present discussion is limited to bilateral treaties; separate provision is made in the Convention for the effect of a breach of a multilateral treaty: Art. 60 (2).

[40] *Yearbook*, 1957, Vol. II, p. 30, art. 18 *et seq.*

Given so narrow a definition of material breach, it is somewhat surprising to find that the Convention also makes provision for the separability of treaty provisions in cases falling under Article 60. Article 44 does indeed introduce an important innovation in extending the principle of separability by treating it not only in the context of breach, but in the wider context of invalidity, termination, and suspension as a whole. But while it was desirable to provide for the possibility of severance in all such cases, rather than allow the whole treaty to lapse, it was necessary to limit it to cases where the balance of rights and obligations between the parties was not seriously disturbed. Under the solution adopted by the Commission, while the general rule preserved the integrity of the treaty, it was provided by way of exception that where the ground on which a state seeks to invalidate, terminate, withdraw from, or suspend the operation of a treaty relates only to particular clauses of the treaty, then the remainder of the treaty will not be affected if two conditions are fulfilled: if the clauses in question are separable from the remainder of the treaty with regard to their application, and if acceptance of those clauses was not an essential basis of the consent of the other party or parties to the treaty as a whole. The Conference added a further condition: continued performance of the remainder of the treaty would not be unjust.[42] Subject to this rule, it is further provided that in cases of fraud and corruption the state which invokes these grounds has the option to invalidate either the whole treaty or the particular clauses to which the fraud or corruption related; and the principle of separability is excluded altogether in three cases: coercion of a representative, coercion of a state, and cases where the treaty conflicts with a rule of *jus cogens*.[43] Finally, the general rule of the integrity of the treaty is made subject to the provisions of Article 60, which, it will be recalled, entitles a state to invoke a material breach as a ground for terminating the treaty or suspending its operation " in whole or in part." If, it may be said, the other party has repudiated the treaty, or violated a provision " essential to the accomplishment of the object or purpose of the treaty," [44] how can any of its provisions be envisaged as remaining operative? In practice, however, there will no doubt be occasions when the sanction of suspension will be invoked in response to a lesser violation; and in such cases it is all the more important that the observance of the whole treaty should not be jeopardised.

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[41] *Cf.* Art. 42 (2) of the Convention, which provides that a treaty may be terminated or suspended " only as a result of the provisions of the treaty or of the present Convention."

[42] Art. 44 (3) (*c*).

[43] Art. 44 (4) and (5).

CONCLUSION

The topics considered above have all related to what might be called the pathology of treaties. But it is of course no accident that, of the eighty-five Articles of the Vienna Convention, no fewer than thirty-one are contained in Part V, dealing with "Invalidity, termination and suspension of the operation of treaties." The principal concern of the codification of the law of treaties must be the security of international transactions. It has been suggested elsewhere that other aspects of the law of treaties, including the complex problems of treaty interpretation, can fruitfully be approached from the same standpoint.[45] But the principle *pacta sunt servanda* requires above all an elaboration of the conditions of invalidity and breach, a specification of their legal consequences, and the provision of adequate procedural safeguards. It remains to be seen how effective the Convention will prove in practice; on paper, it is perhaps the most impressive contribution yet made to the development of international law. By a rare accident, the progressive views of the International Law Commission have coincided with, and been reinforced by, the interests of the new states and the real needs of the international community.

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[44] Art. 60 (3) (b).

[45] Jacobs (1969) 18 I.C.L.Q. 318.

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CHANGING A BARGAIN BY CONFIRMING IT

THE most recent case to contain some discussion of the use by businessmen of confirmation notes and the law applicable to them is *Henry Kendall and Sons* v. *William Lillico and Sons*.[1] In that case, *inter alia*, a contract of sale was made orally by Mr. Golden on the Bury St. Edmund's Corn Exchange for the sale of poultry feeding stuffs to the Suffolk Agricultural and Poultry Producers Association Ltd. (S.A.P.P.A.) by Grimsdale & Sons Ltd. On the following day, Grimsdales sent a confirmation note to S.A.P.P.A. which contained on its back conditions of sale. As the parties had on many previous occasions made contracts in just such a way, both the Court of Appeal and the House of Lords held that the conditions of sale formed part of the contract since both parties were deemed to have contracted on that basis.[2]

The use of confirmation notes, however these be described,[3] serves a useful commercial function. It is obviously convenient to have a written record of an oral agreement, and this explains their widespread use in transactions on stock exchanges.[4] They are, however, frequently used in modern commercial practice to confirm agreements made, for example, by telephone, telex or by travellers. As the making of contracts has become more standardised, indeed mass-produced,[5] businessmen have introduced onto their notes clauses not expressly agreed upon by the parties. Usually, these clauses are exemptive of common law liability. Thus they may purport to include liability for defective quality [6] or liability where goods are unavailable [7] or, as seems common in practice, limit the time within which claims arising out of defective goods may be made. In the United States at least, it is common for both parties to send confirmation notes containing clauses favouring their sender, thus giving rise to what is known as the "battle of the forms."

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[1] [1968] 2 All E.R. 444; in the Court of Appeal [1966] 1 All E.R. 309.

[2] The terms of sale were held irrelevant to the main issue in the case which was concerned with s. 14 of the Sale of Goods Act 1893 and s. 2 of the Fertilisers and Feeding Stuffs Act 1926.

[3] Some of the commonest names are: confirmation notes, bought or sold notes, delivery orders, conditions of sale or contract notes. *Quaere* whether an invoice accompanying goods can be regarded as a confirmation note for the purpose of this article unless its terms are incorporated by usage or course of dealing. It is doubtful whether the parol evidence rule could ever apply to an invoice and it would only rarely give rise to an estoppel, on which see Spencer Bower, *Estoppel by Representation* (2nd ed.), pp. 95 *et seq.*

[4] On this see *Halsbury's Laws of England* (3rd ed.), Vol. 36, pp. 542–544.

[5] See *e.g.* the discussion by Diplock L.J. of the ways of doing business on standard contracts issued by trade associations, [1966] 1 All E.R. 309, 341–343.

[6] As in *Kendall* v. *Lillico*, see note 1 *supra*.

[7] As in *Roe* v. *Naylor* (1918) 87 L.J.K.B. 958.

Whether these clauses on confirmation notes are drafted by commercial men themselves or by their lawyers,[8] it is to be assumed that businessmen consider that they have some effect. It is the purpose of this article to discover what effect, if any, English law gives to such clauses. The scope of this inquiry is, however, limited to the use of confirmation notes in connection with contracts for the sale of goods. Although reference must be made to cases involving other types of contract, no attention in particular is paid to dealings in stocks and shares.

Two possible ways of incorporating the terms of a confirmation note into the bargain are to treat the note either as an offer which may be accepted in the normal way, or as an acceptance of an offer arising out of the oral negotiations. Either view assumes that the oral " agreement " was not intended to be binding. This assumption probably does not reflect the attitude of the English courts.[9] Furthermore, if the note is treated as an offer, no contract will arise if the recipient does nothing to indicate acceptance, or if he sends his own note containing different terms.[10] If the note is treated as an acceptance of an oral offer, no contract will arise because of the strict rule that offer and acceptance must correspond exactly.[11] In any case, if both parties perform on the assumption that a contract has been formed, the courts will be faced with the difficulty of deciding which, if any of the terms contained in, possibly, two notes apply to the oral " agreement."

One case where a confirmation note appears to have been treated as either an offer or an acceptance by at least one judge is *Harnor* v. *Groves*.[12] In that case, the plaintiff orally agreed with the defendant's agent to buy a certain quantity of flour. The jury found that the agent warranted that the flour should be of a particular quality and that he had authority so to warant. On the following day, the plaintiff received from the defendant a sold note which made no mention of the warranty of quality. It was held that the plaintiff could not sue on the warranty, Williams J. stating " the plaintiff is seeking to treat as the contract that which passed between him and the defendant's agent before the contract was actually entered into." This is, however, an isolated example, and the case is fully explainable on other grounds.[13]

In two cases, however, the courts do make use of the traditional principles of contract formation to include at least some of the terms in a confirmation note in the contract. These cases are where the terms in the note would have been implied into the oral agreement by usage or by course of dealing between the parties. Clearly, the courts will give effect to usage where applicable,[14] but such cases must be of increasing rarity in modern commercial practice.[15]

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[8] Lord Devlin suggests that they are mainly the work of commercial men, *Samples of Law Making* (1962), p. 83.

[9] *e.g.*, *Hussey* v. *Horne-Payne* (1879) 4 App.Cas. 311; *Perry* v. *Suffields* [1916] 2 Ch. 187. See also *Roe* v. *Naylor* (*supra*, note 7) where the oral agreement was sued on.

[10] Assuming that notes crossed in the post, there would probably be no contract even if the terms of the notes agreed, *Tinn* v. *Hoffman & Co.* (1873) 29 L.T. 271.

[11] *Cie. de Commerce et de Commission S.A.R.L.* v. *Parkinsons Stove Co. Ltd.* [1953] 2 Lloyd's Rep. 487.

[12] (1855) 15 C.B. 667, 675.

[13] On this case see further pp. 521 *et seq.*, *infra*.

The courts do not seem fully to have analysed the meaning of "course of dealing." Some degree of regularity of conduct is required—but how much? In *Spurling Ltd.* v. *Bradshaw*, for example, it was merely stated that the defendant "had received many landing accounts before," [16] and in *Kendall* v. *Lillico*,[17] there had been three or four deals a month in the previous three years involving the use of such confirmation notes. Moreover, mere regularity seems to be enough; there is no evidence that the courts require evidence that the parties have deemed themselves to be bound by the particular clause in question. Course of dealing differs, in this, from usage. It may also be that, provided there is sufficient regularity, the terms of the note will be implied into the contract even though the terms on the note have not remained constant, as long as the recipient has reasonable notice that there are terms.[18]

There is a further difficulty in the application of this doctrine. As Lord Morris pointed out in *Kendall* v. *Lillico*, "in these circumstances it is reasonable to hold that when S.A.P.P.A. placed an order to buy they did so on the basis and with the knowledge that an acceptance of the order by Grimsdale and their agreement to sell would be on the terms and conditions set out in their contract notes. . . ." [19] Thus S.A.P.P.A.'s offer impliedly contained the terms of the confirmation note which had not yet been sent. However, if the note had not been sent on that occasion, it seems that those terms would not have been a term of the contract.[20] It thus seems that

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[14] In *Roe* v. *Naylor*, *e.g.*, the defendant pleaded a usage to the same effect as the term in his sold note. As Scrutton L.J. pointed out, (1918) 87 L.J.K.B. 958, 964, the fact that the clause was inserted in a note might be evidence that no such usage existed.

[15] See the comments of Lord Devlin, *op. cit.*, pp. 81–82.

[16] [1956] 2 All E.R. 121, 125.

[17] See note 1 *supra*.

[18] Thus in *Spurling's* case, Morris L.J. commented that "it is true . . . that because the evidence of the plaintiff was not heard, there is no positive evidence that the conditions on previous landing accounts were the same as the conditions in the present case. It is clearly established, however, that the defendant knew that there were conditions": [1956] 2 All E.R. 121, 127. See, however, *Roe* v. *Naylor* (1918) 87 L.J.K.B. 958, 963, where it was pointed out that in that case there was no evidence that the terms in the note used on previous occasions had been the same and hence the condition in the sold note was not incorporated.

[19] [1968] 2 All E.R. at p. 462.

[20] *McCutcheon* v. *David Macbrayne Ltd.* [1964] 1 All E.R. 430. In that case, the usual procedure of signing a written contract was not adopted. It was held that the consignor of the car which had been destroyed was not bound by terms whose substance he did not know. Commenting on this case, Lord Pearce stated, [1968] 2 All E.R. at p. 481, "the ordinary course of business was therefore no help to the carrier, since the transaction did not follow the ordinary course." Presumably the same would apply if the confirmation note were not sent.

S.A.P.P.A.'s offer to buy goods was on the express terms of their offer subject to an implied condition reserving to Grimsdale the power to incorporate the terms of their sold note, provided it was sent (received?) within the usual time!

Apart, therefore, from usage and course of dealing, confirmation notes should, in principle, be treated as post-contractual documents ineffective to impose exemption clauses.[21] But, despite the two major obstacles placed by English law in the way of variations of, or additions to, a contract already formed, confirmation notes have not always been regarded as inoperative, even when sent after the conclusion of a valid contract. The first obstacle is absence of consideration, for the sender of a note will generally furnish no consideration for the surrender by the recipient of his common law rights. Consideration will be furnished if it can be said that the original contract is rescinded and replaced by a new one, but, given the type of clause which normally appears on confirmation notes, this will be exceptional.[22] The second obstacle is that the recipient will generally not accept the terms on the confirmation note. Even if he checks that the agreed terms are reproduced,[23] silence is not acceptance [24] nor, indeed, is a "mere private act such as putting a letter into a drawer." [25]

However, echoes of a doctrine of silent acceptance appear in two technical rules which have been applied by the courts to confirmation notes. They are the parol evidence rule and the doctrine of estoppel. Where these rules are applied, questions of both consideration and acceptance are irrelevant.

The function of the parol evidence rule is to exclude evidence of matters not contained in the written agreement of the parties. When the rule is applied, the oral agreement of the parties in so far as it adds to, varies or contradicts the terms of the writing becomes irrelevant. If, therefore, the rule is applied to confirmation notes, it may be possible to exclude terms actually agreed upon by the parties. An example of this is the case of *Harnor* v. *Groves*, the facts of which have already been stated.[26] Alternatively, it may be possible to include terms which have not been agreed between the parties. An example of a case where this nearly happened is *Roe* v. *R. A. Naylor Ltd.*, which is discussed in detail later.[27]

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[21] *Olley* v. *Marlborough Court* [1949] 1 K.B. 532.

[22] In *Stead* v. *Dawber* (1839) 10 A. & E. 57, an agreement to put back delivery by two days was held a rescission of a former contract and the creation of a new one. This must, however, presumably be read subject to the House of Lords decisions in *Morris* v. *Baron* [1918] A.C. 1 and *British & Beningtons Ltd.* v. *N.W. Cachar Tea Co.* [1923] A.C. 48, 68 where it was said that there would be no rescission unless the variation went "to the very root of the original contract." The test for rescission thus appears to be a very strict one.

[23] As, for example, in *Roe* v. *Naylor* (1918) 87 L.J.K.B. 958.

[24] *Felthouse* v. *Bindley* (1862) 11 C.B.(N.S.) 869. It is assumed that the same principle applies to modification and rescission as to formation.

[25] *Per* Lord Blackburn, *Brogden* v. *Metropolitan Ry.* (1877) 2 App.Cas. 666, 692.

[26] (1855) 15 C.B. 667, see p. 519.

[27] See note 7 and see p. 524.

There is a large number of cases, particularly in the earlier part of the nineteenth century, where the courts have almost automatically applied the parol evidence rule to confirmation notes [28] and similar documents.[29] In many of these cases, special factors were present, for example, the note was made virtually contemporaneously with the oral transaction,[30] or the note was signed by both parties [31] or by a common agent.[32] Nevertheless, the courts seem generally to have assumed that a bought or sold note was the written agreement of the parties and much of the discussion centred upon whether the term sought to be incorporated was merely a "suppletory matter" [33] or contradicted the terms of the writing.[34] The case nearest approaching the use made of the confirmation note in *Kendall* v. *Lillico* is that of *Harnor* v. *Groves*.[35] There, Jervis C.J. stated

> "the contract is the note in writing; for if the plaintiff had intended to say that the note did not truly represent the real bargain . . . he should immediately have returned the note. Instead of so doing, he takes it without that warranty [of quality] and so adopts the contract as a contract made without that qualification." [36]

Will the courts now apply the parol evidence rule to confirmation notes in the way they did in the nineteenth century so as to bind the recipient to terms to which he did not agree? This resolves itself into two further questions: (1) will the courts automatically assume, as for example did Scrutton L.J. as late as 1918,[37] that the confirmation note is the written contract, and (2) will the courts apply the rule to confirmation notes on the basis that the parties have treated the note as containing the terms of their contract and are thus bound to those terms by some form of estoppel? These questions, though related, need to be discussed separately, but many of the comments made are relevant to both.

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[28] *e.g.*, *Dalison* v. *Stark* (1803) 4 Esp. 163 (dictum); *Greaves* v. *Ashlin* (1813) 3 Camp. 426 (sold note for oats—oral term that oats should be taken away immediately excluded); *Syers* v. *Jonas* (1848) 2 Ex. 111 (sale of tobacco—usage held applicable to bought and sold notes in identical terms); *Spartali* v. *Benecke* (1850) 10 C.B. 212 (sold note of wool—usage held contradictory); *Harnor* v. *Groves* (1855) 15 C.B. 667; *Field* v. *Lelean* (1861) 6 H. & N. 617 (sale of shares); *Fawkes* v. *Lamb* (1862) 31 L.J.Q.B. 98 (sale of rum by broker).

[29] *e.g.*, *Jefferey* v. *Walton* (1816) 1 Stark. 267 (memorandum of conditions of hire of horse made and kept by the owner); *Ford* v. *Yates* (1841) 2 M. & G. 549 (note made by defendants' agent in plaintiff's order book—evidence of course of dealing excluded).

[30] *Spartali* v. *Benecke* (1850) 10 C.B. 212.

[31] *Field* v. *Lelean* (1861) 6 H. & N. 617.

[32] *Syers* v. *Jonas* (1848) 2 Ex. 111.

[33] *Jefferey* v. *Walton*, see note 29.

[34] See, for example, the conflict between *Spartali* v. *Benecke* and *Field* v. *Lelean* and between *Ford* v. *Yates* and *Lockett* v. *Nicklin* (1848) 2 Ex. 93.

[35] (1855) 15 C.B. 667.

[36] *Ibid.* at p. 673. See also the judgment of Bailhache J. in *Roe* v. *R. A. Naylor Ltd.* (*No. 1*) [1917] 1 K.B. 712, 714. This was the first appeal from a county court hearing. As a result of this appeal, the case was sent back for a new trial. The appeal from this second trial is cited throughout this article without a number. Bailhache J. said, "I take the law to be that when the parties to a contract of sale exchange bought and sold notes, or when the seller hands to the buyer a sold note which is accepted by the buyer as being the contractual document, it is no part of the seller's duty to request the buyer to agree to the terms contained in the sold note or to call his attention to its terms. If the buyer accepts the sold note without reading it he does so at his own risk."

[37] *Roe* v. *Naylor* (1918) 87 L.J.K.B. 958, 963–965.

(1) It is, indeed, open to doubt whether the courts will, without more, treat a confirmation note as the written contract of the parties. Many of the old cases are a reflection of the requirement of the Statute of Frauds that contracts for the sale of goods of £10 or over be evidenced in writing. While the parol evidence rule and section 4 of the Sale of Goods Act 1893 are conceptually distinct, it is clear that many of the old cases are explicable as attempts to find a satisfactory memorandum so as to uphold the contract.[38] With the repeal of section 4, it would be surprising if the courts were to impose formality-based rules with the same vigour. In any case, the parol evidence rule is, itself, in decline.[39] The rule is now usually stated in terms of the intention of the parties[40]—if the parties intended the writing to be their contract, it will be so treated. One of the more famous cases supporting this formulation of the rule is *Allen* v. *Pink*,[41] which involved a note made of the sale of a horse which contained no mention of a term that the horse was a quiet worker and would go well in harness. Though decided in 1838, in the heyday of the application of the parol evidence rule to confirmation notes, it is important to note that the horse was worth less than £10.

One of the factors which now leads the court to apply the parol evidence rule is the form of the document—"if it looks like a complete contractual document, it will shut out oral evidence, whatever the parties intended."[42] But it is submitted that the average confirmation note does not look like a complete contractual document. The recipient is not a party to its preparation, he does not authorise nor does he sign it—all factors which led to the holding that a bill of lading was not the written contract of the parties.[43]

Although the parol evidence rule still no doubt applies to formal commercial contracts, there is no evidence of its modern application to confirmation notes. It was, for example, mentioned in neither *Spurling's* case[44] nor in *Kendall* v. *Lillico*.[45] Judicial hostility to exemption clauses may also be a factor in this trend.

(2) The relationship between the parol evidence rule and the doctrine of estoppel is unexplored, although it clearly exists. The

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[38] See the judgment of Maule J. in *Harnor* v. *Groves* (1855) 15 C.B. 667, 674, for example.

[39] For a recent discussion of the rule, see Wedderburn, "Collateral Contracts" [1959] C.L.J. 58, 59–64.

[40] *e.g.* Phipson, *Evidence* (11th ed.), para. 1781 *et seq.*

[41] (1838) 4 M. & W. 140.

[42] Treitel, *Law of Contract* (3rd ed.), p. 152; *Hutton* v. *Watling* [1948] Ch. 398.

[43] *SS. Ardennes* [1951] 1 K.B. 55.

[44] See note 16.

[45] See note 1.

clearest expression of this idea is found in the judgment of Jervis C.J. in *Harnor* v. *Groves*,[46] as also in the judgment of Erle C.J. in *Malpas* v. *L.S.W.R.*[47] Commenting on the case of *Jefferey* v. *Walton*,[48] the Chief Justice stated that the case had been misreported:

> " The writing in the case did not purport to be an agreement but was only a memorandum in pencil. . . . The ruling may be sustained, however, on the grounds that the memorandum was given by one of the parties to the other at the time as evidence of the agreement between them, and was acted upon by both parties, and there was therefore an estoppel in evidence."

Similar reasoning seems to have been adopted by Swinfen-Eady M.R. in *Roe* v. *R. A. Naylor Ltd.*[49] In that case, the defendant's traveller visited the plaintiff and showed him a catalogue of timber. The plaintiff marked those items he desired to purchase. The following day he received a confirmation note which he did not read until two days later, and then only to check descriptions and price. The sold note contained a term written sideways and in small print that " goods are sold subject to their being on hand and at liberty when the order reaches head office." The plaintiff sued the defendant for non-delivery of some of the timber. Three further facts are relevant. First, there was a conflict of evidence as to whether the sold note had been sent by post or delivered personally by the traveller. The court regarded this as immaterial except as evidence that there had been no discussion of the disputed condition. Secondly, the plaintiff expressly sued on the oral contract—section 4 of the Sale of Goods Act 1893 was irrelevant to the case, although the defendants relied on the condition in the sold note. Thirdly, it was held that a reasonable man would not have seen the condition even though the plaintiff himself suffered from bad eyesight.

The Master of the Rolls held that when the sold note was handed over, it was a memorandum of the contract, not the contract itself. The reason for this holding is not clear, but this is not here relevant.[50] To the subsequent argument that " the plaintiff assented to and relied upon the subsequent memorandum " so as to make the memorandum the contract, the Master of the Rolls replied that the plaintiff " explained the circumstances under which he did that; he only accepted it while not knowing of the condition and he repudiated it when he became aware of the condition." [51] Inferentially, the plaintiff would have been estopped from denying that the sold note contained the terms of the contract, had reasonable notice of the term been given. Other statements of estoppel principles may be found.[52]

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[46] (1855) 15 C.B. 667.

[47] (1866) L.R. 1 C.P. 336, 339. Here the plaintiff wished to send cattle from Guildford to King's Cross. He paid for the full journey, but the consignment note only provided for a journey to Nine Elms. The cattle were delayed at Nine Elms and suffered damage. It was held that the plaintiff could prove the additional oral contract for carriage from Nine Elms to King's Cross.

[48] See note 29.

[49] (1918) 87 L.J.K.B. 958.

[50] Apparently, he regarded the note as no contract because it was not a sufficient memorandum for the Statute of Frauds, see *ibid.* at pp. 962–963. This holding appears to confuse the parol evidence rule with s. 4 of the Sale of Goods Act 1893 and is all the more surprising since the Master of the Rolls expressly stated that s. 4 was not relevant to the case as the statute was not pleaded and, in any case, part delivery had been made. In the upshot, the plaintiff recovered damages.

If estoppel applies in the context of the parol evidence rule, a number of problems arise:

(a) Despite the views of Erle C.J., there appears to be no reason why the confirmation note need be handed over contemporaneously with the making of the contract in order to raise an estoppel. Certainly, both *Harnor* v. *Groves* [53] and *Roe's* case [54] are authority against this view. That the note need not be handed over at the time of the contract reflects normal estoppel principles since, provided the other requirements are fulfilled, actions in performance of a contract may raise an estoppel.[55] However, the later the confirmation note is sent, the less likely it is that a court would hold that the recipient was bound by it. This accords with commercial good sense.

(b) If the parties expressly treat the confirmation note as containing the terms of their contract, the note should clearly be treated as their contract. In few cases, however, is there any evidence that the parties have done so. Apart from this clear case, the normal rules of estoppel should apply. The question, therefore, is whether the application of estoppel principles in cases such as *Harnor* v. *Groves* and *Roe's* case accords with principle.

To raise an estoppel by words or, as is relevant in our case, conduct, the representor must wilfully represent by his conduct that certain facts are true and the representee must rely upon such a representation by changing his position. A representation may be wilful if a person " so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it." [56] Any representation made must be unambiguous so that a reasonable man would feel safe in relying on it.[57]

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[51] p. 968.

[52] *e.g. Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416, 421; *Wells* v. *Centaur Co.* (1921) 126 L.T. 242, 245 *per* P. O. Lawrence J., " in my view unless those terms [excluding liability] are referred to in some document which is accepted as the contractual document by the buyer, the terms will not be imported. . . ." Of course, acceptance of a document as the contractual document is easy to imply the more closely related in time the document is to the oral agreement. Indeed, where the note is handed over at the time of the contract, the document can be regarded as merely the culmination of the bargaining process.

[53] See note 46.

[54] See note 49.

[55] *Lyle-Mellor* v. *A. Lewis & Co. Ltd.* [1956] 1 W.L.R. 29, where the defendant's acts in performing the contract were held to estop him from denying that what he had done was in performance of that contract.

[56] *Freeman* v. *Cooke* (1848) 2 Ex. 654, 663, *per* Parke B.

In the case of confirmation notes, it is necessary to find that the recipient of the note represents that he accepts it as containing the terms of the contract and the sender of the note changes his position in reliance upon that representation.

Any representation by the recipient of a note will generally consist either in his conduct in performing the contract or in his remaining silent when he ought to have stated that he did not accept the terms in the note.[58] Whether any such representation is made is bound up with whether it can be described as unequivocal.

Does the recipient represent by conduct that he regards the confirmation note as containing the terms of the agreement? Generally, the sender of the note will have no means of knowing whether the recipient has read it, *e.g.* because it is sent by post. To hold that performance by the recipient is a representation that he accepts the terms in the note involves two further assumptions—first, that the recipient knows of the terms and, secondly, that he accepts them.

It is difficult to understand why the sender of the note should be entitled to assume that the recipient has, in all cases, read the small print. As like as not, the sender does not read the " boiler plate provisions " on the contract notes which he receives—most commercial men probably only check that the agreed terms are reproduced. The more elaborate the contract note, the less likely it is that a busy recipient would read it—in fact, of course, it will probably only be some junior clerk who does the checking. In *Roe* v. *Naylor* [59] the court surmounted this problem by applying the " ticket cases "—the recipient is deemed to know of the terms of the note, if reasonable notice was given. It may be doubted whether the analogy with the ticket cases is exact. The fact, of doing business through a railway guichet, appears substantially different from our case. If one party to a contract wishes to change its terms, why should he not be required to do so expressly? However, *Roe's* case has been quoted without disapproval on this point and must be taken to be good law.[60]

Even if the recipient is deemed to know of the terms of the note, it is not clear why his acts of performance should be regarded as an unequivocal statement that he accepts those terms. Performance by the recipient is equally to be regarded as a representation that he does not accept the additional terms but is performing the contract as originally agreed. His actions are at least as ambiguous as the representation in *Low* v. *Bouverie*[61] itself and the courts have shown themselves strict in their application of the unequivocality test.[62]

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[57] *Low* v. *Bouverie* [1891] 3 Ch. 82.

[58] Other considerations apply if the recipient expressly agrees to be bound by the terms in a confirmation note.

[59] See note 49.

[60] *Hutton* v. *Watling*, see note 53; *L'Estrange* v. *Graucob, Ltd.* [1934] 2 K.B. 394, 403, *per* Maugham L.J; *J. Spurling* v. *Bradshaw* [1956] 2 All E.R. 121, 127, citing *Roe* v. *Naylor* (*No.* 1) [1917] 1 K.B. 712.

There is another reason why the recipient of a confirmation note who performs should not be estopped from denying that he agreed to the note's terms. This is that, in many cases at least, the sender of the note will change his position before any acts by the recipient. *Roe's* case appears to be an example of this. In that case, the defendant relied upon the note by not seeking to buy in wood which he did not have in stock. This reliance probably took place long before the plaintiff did any act in performing the contract. What the sender of the note generally relies upon is not the conduct of the recipient, but his silence.

To cure these two difficulties of ambiguity and reliance, it is clear that the only solution is to impose a duty on the recipient to protest within a reasonable time against any term not accepted by him. This is to return to what Jervis C.J. stated in *Harnor* v. *Groves*, and it also appears to be an explanation of Swinfen-Eady's judgment in *Roe's* case. Mere silence to a confirmation note does not raise an estoppel unless " there is a duty cast upon a person, by usage of trade or otherwise."[63] Usage and course of dealing aside, there is little reason to suppose that English law imposes such a duty on persons supposedly bargaining at arm's length. Although there may be an estoppel where a person knowingly allows himself to be represented as a principal,[64] it is doubtful whether, even if this principle applies outside the law of partnership, it extends to knowingly standing by and allowing the sender of the note to think that his terms are part of the contract. It is only in very exceptional circumstances that a duty to act has been imposed.[65]

The principle in *Roe* and *Malpas* is thus difficult to reconcile with the ordinary principles of estoppel, unless they and *Harnor* v. *Groves* are treated as authority for the proposition that the recipient of a confirmation note, at least if he is a businessman, is estopped by his silence. Stated so baldly, the proposition seems doubtful. It is, of course, possible to explain or circumvent these cases. *Harnor* v. *Groves* may be explained both by the importance of the Statute of Frauds (a consideration which may also affect *Roe's* case [66]) and by the more vigorous application of the parol evidence rule at that time.[67] The dictum of Erle C.J. in *Malpas* v. *L.S.W.R.* is clearly an attempt to explain the inexplicable and its charity is probably greater than its authority. The decision in Roe's case may also be explained by reference to the judgment of Duke L.J.[68] His view was that the confirmation note would have constituted an offer to vary the terms of the contract, had reasonable notice of the condition been given. Although this view is that of one judge only, it seems a reasonable explanation of the case. It confines the ticket cases to their traditional sphere—the implication of terms into an offer, and it still leaves open the question of policy—whether the recipient of the note accepts such an offer by performing.[69] In any case, the *ratio decidendi* of the case appears only to be that the clause was not operative owing to the absence of reasonable notice. All the rest is strictly dicta.

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[61] See note 57.

[62] *e.g.* *Re Lewis* [1904] 2 Ch. 656.

[63] See note 56.

[64] *Walter* v. *Ashton* [1902] 2 Ch. 282, 294, *per* Byrne J., who suggested that s. 14 of the Partnership Act 1890 embodied a general principle of estoppel. S. 14 provides that " everyone . . . who knowingly suffers himself to be represented, as a partner in a particular firm . . . is liable."

[65] See, generally, Spencer Bower, *op. cit.*, pp. 45 *et seq.* The courts seem particularly reluctant to place any duty on a party to a contract. Thus in *Leslie & Co.* v. *Commissioners for Works* (1914) 78 J.P. 462, it was held that one party was not bound to correct the other's misinterpretation of the contract even when this was known. In *Scriven Bros.* v. *Hindley & Co.* [1913] 3 K.B. 564, it was held that a buyer owed no duty to the seller in the examination of samples.

Until further judicial determination, it is impossible to state confidently that the recipient of a confirmation note is bound by its terms if he has reasonable notice of them and does not protest.

SUMMARY AND CONCLUSION

English law clearly gives effect to the terms of confirmation notes where those terms are implied into the contract by usage, or course of dealing, or where the parties expressly accept the note as containing the terms of their agreement or are estopped from denying that they are bound by such terms. Apart from these cases, it is possible, although unlikely, that the recipient of a confirmation note is bound to protest against the terms of which he has reasonable notice and by which he does not wish to be bound.

A further way of giving effect to terms on confirmation notes would be by an adventurous use of the implied term. Where one or both parties ought to know from prior dealing or general commercial knowledge that the other habitually does business only on set terms contained in confirmation notes, it might be possible to hold that the oral agreement is made subject to the implied condition that terms may be added by confirmation. If the contract is made by an agent, his usual authority might arguably be limited in this way. If each party ought to know that the other so contracts, then the terms on both notes will be incorporated, provided they do not conflict with each other or the express oral agreement.

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[66] See note 49.

[67] A consideration which also affects *Roe's* case, see note 37.

[68] (1918) 87 L.J.K.B. 958, 965–966.

[69] In *Hutton* v. *Watling* [1948] Ch. 398, 404, Lord Greene, M.R. explained *Roe's* case as one "where there was an oral agreement and the vendor then attempted to put upon the purchaser a term which was no part of the oral agreement and was never subsequently *accepted* by the purchaser" (emphasis added).

Such implication, however, seems unlikely. First, it conflicts with the cases on course of dealing, for, if knowledge is sufficient, lengthy dealing is unnecessary. Secondly, the implication is not evidently necessary to give business efficacy to the contract and, given present judicial attitudes to exemption clauses, the recipient would seem justified in saying " 'Oh, of course,' [70] I wouldn't have agreed." Thirdly, this analysis could be used to impose conditions on private individuals as opposed to businessmen. If terms on confirmation notes are to be incorporated, it may be that it should only be done in the case of contracts made between businessmen. It would not be difficult to construct a working definition of "businessman," [71] but the courts do not seem to favour the creation of a special law of commercial exemption clauses.[72]

It is submitted that the law on confirmation notes is unsatisfactory, depending as it appears to do upon the uncertainties of usage, course of dealing, the remnants of the parol evidence rule and, possibly, implied terms. In its general review of contract law, it is to be hoped that the Law Commission will give some attention to this practical problem.

A. J. C. HOGGETT *

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[70] Treitel, *op. cit.*, p. 161. See, also ***McCutcheon*** v. ***David MacBrayne Ltd.***, note 20.

[71] *Cf.* U.C.C. s. 2–104 (1) which defines merchant as one "who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." *Cf.* also para. 469 of the Molony Committee Report on Consumer Protection, Cmnd. 1781 (1962), and see, Law Commission, ***Exemption Clauses in Contracts First Report: Amendments to the Sale of Goods Act*** 1893 (Law Com. No. 24), p. 53.

[72] *e.g.* ***Scruttons Ltd.*** v. ***Midland Silicones Ltd.*** [1962] A.C. 446; and *cf.* Diplock L.J. in ***Kendall*** v. ***Lillico*** [1966] 1 All E.R. 309, 341–343, with the House of Lords in the same case [1968] 2 All E.R. 444.

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STATUTES

LOCAL AUTHORITY SOCIAL SERVICES ACT 1970

THE social services provided by local authorities have been developed almost entirely at random during the past eighty years, in response to the perceived needs of the moment, rather than in accordance with preconceived theories of social welfare and administration. In so far as these services were governed by any guiding administrative principle, it was the principle laid down by Edwardian poor law reformers like Morant and the Webbs, that social services should be divided according to a strict classification of their functions, rather than according to the social and economic status of their clients.[1] This was a useful principle with which to attack the prevailing distinction between "pauper" and "non-pauper" services; but it was rather a crude instrument for discovering and relieving different kinds of social need. It led to a situation in which the problems of a single family might be examined and treated by a dozen or more statutory and voluntary social work agencies; and it ignored the fact that, although problems of education, housing, health, old age and child care may be logically separable, they are in a large number of cases practically interdependent.

Lack of co-ordination among the different local authority social service departments, and the need for a more synoptic, "family-centred" service have been discussed by several investigating bodies during the past decade [2]—the latest and most exhaustive of these being Sir Frederick Seebohm's Committee on Local Authority and Allied Personal Services which reported in July 1968. The Seebohm Committee outlined a plan for the drastic revision of local social services, in both organisation and general frame of reference. It proposed that the functions of local children's departments should be linked with the "social" functions of housing, education, health and welfare departments, and with the welfare services available under the National Assistance Act, to form one single consolidated "social service department."[3] These departments should ultimately be staffed, no longer by specialists familiar with only one branch of social work, but by generically-trained social workers able to understand and treat all aspects of a family situation.[4] Heading this new kind of department would be "principal officers," who would be either "administrators with qualifications in social work" or "professionally qualified social workers with training in management and administration."[5] The function of these departments would be not merely to provide a new family service, but to establish new links between social services and the local community and to foster community consciousness—the absence of which the committee diagnosed as one of the most crucial causes of delinquency and social breakdown.[6] The allocation of resources within these new departments and between one locality and another should in future be based on far more intensive research into local conditions[7]; and extra resources should be made available for areas of special need.[8] Finally, although the Seebohm committee had no power to consider the organisation of central government, it urged that one single Minister and civil service department should be responsible for local authority social services in Westminster and Whitehall.[9]

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[1] *Royal Commission on the Poor Laws*, Minority Report. Cd. 4499, 1909, pp. 1219–1231. Ministry of Reconstruction, *Poor Law Reform*, 1919, p. 23.

[2] *Report of the Committee on Children and Young Persons*, Cmnd. 1191, 1960. *Report on Children and Young Persons* (*Scotland*), Cmnd. 2306, 1964. *The Child, the Family and the Young Offender*, Cmnd. 2742, 1968.

[3] Cmnd. 3703, para. 168.

[4] *Ibid.*, paras. 516–522, 531–532.

The Local Authority Social Services Act, by which the Labour Government sought to implement these proposals in England and Wales, is by comparison a very cautious document. "Dry as dust and very much a machinery measure,"[10] it erects a bare minimum of scaffolding for the construction of the new family and community service envisaged by the Seebohm Report. The Act makes two main changes in social service administration.

First, the Act lays down that each local authority—either singly or in conjunction with another local authority—shall establish a "social services committee," which will take over the functions of existing committees with regard to the care of children, young persons, the aged and the mentally disordered.[11] Responsibilities under the National Health Service Act will be transferred from health departments only in so far as they are "social" rather than "medical"[12]; and, contrary to the Seebohm plan, the new committees will not take over the social welfare functions of local authority education and housing departments.[13] The creation of these statutory committees was criticised on the second reading of the Bill in the Commons as an unnecessary constraint upon the freedom of local authorities[14]; and the Minister introducing the Bill, Mr. Crossman, admitted that it was contrary to the general trend away from statutory committees prescribed by Lord Redcliffe-Maud. But he defended compulsion on the ground that opinion was still divided about the form which social service reconstruction should take. When an integrated structure was accepted as the norm, he promised, then the measure might be reviewed [15]; but in the meantime a statutory requirement was necessary to secure universal acceptance—an interesting example of the view that public opinion is moulded and not merely reflected by statute law.

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[5] *Ibid.*, para. 19.

[6] *Ibid.*, Chapter XVI.

[7] *Ibid.*, paras. 455–473.

[8] *Ibid.*, paras. 485–488.

[9] *Ibid.*, paras. 687–689.

[10] H.C.Deb., Vol. 801, col. 942.

[11] s. 2 and Sched. 1.

[12] Local Authority Social Services Bill. Explanatory and Financial Memorandum, cl. 2.

[13] H.C. Deb., Vol. 795, cols. 1453, 1460.

[14] *Ibid.*, cols. 1446–1447.

Secondly, the Act provides for the creation of "directors of social services," to execute the functions of the new multi-purpose social service departments.[16] These officials are to be appointed by local authorities, at first in conjunction with the Secretary of State,[17] and later in accordance with rules about qualifications laid down by the Secretary of State.[18] The fact that these qualifications are not prescribed in the Act or its Schedules suggests that there is still some doubt in the minds of responsible Ministers about the kind of professional animal they are hoping to attract to these posts. What is undoubtedly the case, however, is that the creation of these directorships will be of enormous significance to the social work profession. In the past few months the remuneration offered to senior social workers has been doubled and even trebled by local authorities which have anticipated the present Act; and for the first time in the history of the profession a qualified social worker can look forward eventually to securing a salary and status comparable with those of a bank manager, professor, assistant secretary or county court judge.[19]

These are the main structural innovations made by the Local Authority Social Services Act. The Act also makes provision for the keeping of separate "social services" accounts by county borough councils [20]; for protection of the professional interests of existing local authority employees affected by the Act [21]; and for the reconstruction of the statutory councils concerned with social work training.[22] As recommended by Seebohm, the reorganisation of the social services has been introduced in advance of the more general reforms which are currently advocated in the sphere of local government. On the basis of past experience this was almost certainly a wise decision, the alternative being the risk of indefinite postponement of social service reforms.[23] The effects of reorganisation should be to streamline the administrative aspects of social work, to minimise duplication of professional effort and to reduce the number of separate agencies proffering their various services to the often bewildered client. Nevertheless, the Act is open to criticism on several grounds, in the light both of the Seebohm proposals and of more general considerations of social policy.

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[15] *Ibid.*, col. 1419.

[16] s. 6.

[17] s. 6 (4).

[18] s. 6 (8).

[19] Salaries for directors of social services advertised by county and county borough councils have ranged from £4,640–£5,260 (Cumberland) to £6,500–£7,850 (Kent). *New Society*, May 14 and 28, 1970.

[20] s. 8.

[21] s. 9.

[22] s. 11.

[23] *e.g.* the social service reforms proposed by the Royal Commission on the Poor Laws (1909) were postponed until local government had been reformed—and were consequently ignored for the next 20 years.

First, the Act leaves unsettled the question of which Cabinet Minister is ultimately responsible for the central supervision of the new social services departments. Section 7 of the Act lays down that, in the exercise of their social service functions, local authorities shall " act under the general guidance of the Secretary of State." But there are at present no less than nine Secretaries of State, including both the Home Secretary and the Secretary of State for the Social Services. By not vesting control in any single Minister, and by leaving the Home Office with its traditional responsibility for child care, the Act perpetuates the division of responsibility at the apex of the administrative hierarchy—a fact which seems rather anomalous in view of the emphasis placed on unification of services at a local level.

Secondly, the explanatory memorandum attached to the Bill as first presented to Parliament clearly stated that the measure was " not expected to have any appreciable overall effect on public service manpower requirements " nor " to result in any significant increase of expenditure out of public funds." [24] But this scarcely seems a realistic view of a reform which has been partly called into being by the grossly inadequate coverage of existing social services, and whose success or failure will be largely judged by the extent to which it leads to the identification and treatment of previously neglected areas of social need.

A third and more fundamental criticism centres on the question of whether a machinery measure of this kind can in fact effect the change in the orientation of social work recommended by Seebohm and apparently endorsed by all the main political parties. The Act on its face makes no provision for any kind of qualitative or quantitative change in the execution of social policy; and proposals for including in the text of the Act a specific commitment to the promotion of social welfare were rejected by the Labour Government at the third reading [25]—although a commitment of this kind was included in the analogous Social Work (Scotland) Act 1968.[26] Pressure for the creation of new family-centred services and for the forging of new links with local communities will presumably come from directives issued by the Secretary of State—or rather from the interdepartmental " group of officials " established in Whitehall to reconcile the views of the various interested Secretaries of State.[27] Even so, it remains to be seen how far structural reform and the upgrading of the social work profession can effectively change the theory and practice of social work; and there is at least a risk that the streamlining of social work in the town hall may render the individual social worker not less but more remote from the consumer and the community than ever before.

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[24] Local Authority Social Services Bill. Explanatory and Financial Memorandum, p. iii.

[25] H.C. Deb., Vol. 801, cols. 946–958, 961–968.

[26] s. 12.

[27] H.C. Deb., Vol. 795, col. 142.

JOSÉ HARRIS

LAW REFORM (MISCELLANEOUS PROVISIONS) ACT 1970

THIS Act [1] abolishes actions for breach of promise of marriage,[2] the right to claim damages for adultery,[3] and actions for seduction of a child, and enticement of or harbouring a spouse or child.[4]

1. *Breach of promise*

Breach of promise actions have rarely been tried in recent years.[5] Two main arguments were used in favour of abolition. First, it is contrary to public policy to allow the threat of legal action to force marriage on an unwilling party. Secondly, the threat of an action was sometimes used "to compel overly-apprehensive and naïve defendants into making settlements in order to avoid the embarrassing and lurid notoriety which accompanied litigation . . ." in which "innocent defendants became unregenerate scoundrels and tarnished plaintiffs became paragons of lofty sensibility and moral impeccability." [6] Clearly, the action was less useful as solace to a wronged woman than in those bygone days when it could be claimed that "marriage and a settlement were the one object in a woman's life, whereas men had numerous engagements to occupy their time and attention, and to divert chagrin and disappointment," [7] nor was it now possible to justify retaining the action on the principle that by the provision of legal redress an offender is protected from unofficial retaliation—an argument which may have been valid in 1876 when an outraged father was reported as saying "I must either punish the scoundrel by bringing an action against him, or I must break his neck."[8] The arguments in favour of retaining the action (at least in a modified form) were substantially financial, recalling Mathew J.'s charge to a Victorian jury that "love is not a necessary element in a breach of promise case."[9] First, a party to an engagement might suffer unfairly if in reliance on the engagement he had incurred expenditure or commitments[10] (such as the air fare to return from the Antipodes for the wedding, the cost of a trousseau, or giving up an employment or trade in contemplation of the marriage). Secondly, the woman might have become pregnant as a result of intercourse which she only permitted on the strength of the promise of marriage. An action for breach of promise might give her a capital sum to be used for the child's benefit.

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[1] Which comes into force on January 1, 1971.

[2] Implementing Law Com. No. 26.

[3] Implementing Law Com. No. 25, paras. 99 *et seq*; see also Published Working Paper No. 9, paras. 128–142.

[4] Partially implementing Law Reform Committee's 11th Report (Cmnd. 2017) and Law Commission's Published Working Paper No. 19. It is not thought necessary to say anything further about this provision of the Act.

[5] "The Civil Judicial statistics do not reveal the number of actions brought each year for breach of promise. But even if it were possible to ascertain this number it would be difficult to assess the significance of the right of action; there must be some instances in which its use is threatened, and a settlement reached before the issue of a writ": Law Com. 26, note 14. It is also not known how far the existence of a legal right of action influences social norms—*e.g.* that presents should be handed back.

[6] *Pavlicic* v. *Vogtsberger* 136 A. 2d 127 (1959).

[7] Sir E. Wilmot, M.P., opposing the abolition of the action in 1876: *Hansard*, Vol. 245, col. 1876.

The Act does nothing to meet these needs although an attempt is made to deal with some of the proprietary problems which may arise from the termination of an engagement. It would not be necessary to rely on breach of promise actions to recover capital for the benefit of an illegitimate child if lump sum awards could be made in affiliation suits; the Government refused to consider this at the time of the Maintenance Order Act 1968, but the problem is now to be reviewed by Mr. Morris Finer's Committee on fatherless families. The Act's main provision is: "An agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights, and no action shall lie in England and Wales for breach of such an agreement, whatever the law applicable to the agreement."[11] The Law Commission rejected suggestions that the action should be preserved, but limited to the recovery of special damage,[12] or that it should be replaced by a system of apportioning gains and/or losses.[13] The rules for determining disputes about property can be summarised as follows:

(i) *Gifts.* Under the old law a gift made in contemplation of marriage by one party to the other was *conditional* on the marriage taking place, and was in the nature of a *pledge*, so that it could not be recovered by the party in default.[14] The Act makes a distinction between engagement rings[15] and other conditional gifts. The Law Commission thought that it was of "overriding importance" to do away with inquiries into fault, and recommended that a donor "should not be precluded from recovering the gift on termination of the agreement by reason of the fact that he was responsible for the termination." [16] The Act accepts that general principle, but introduces a new presumption that the gift of an engagement ring is an *absolute* gift.[17] It may be attractive to say that the reason for this change is to make the ring "a love token, and not a returnable deposit," [18] but in reality the amendment was made so as to preserve the right of the wronged woman to throw the ring into the river rather than return it to her former fiancé.[19] It reconciles the recognition of this desire with the need to avoid judicial investigation of culpability by changing the law of property, and at the price of allowing the donee of a ring who has wrongly terminated an engagement to keep the ring. In the case of engagement rings, the presumption of an absolute gift may be rebutted (*e.g.* if the ring is a family heirloom); in the case of other gifts the old law must still be referred to in order to decide whether the gift was conditional or absolute.[20] If it is construed as a conditional gift, it may be doubted whether the Act [21] fully implements the proposal that the right to recover should no longer depend on absence of fault: it provides [22] that a donor "shall not be prevented from recovering the property *by reason only of his having terminated the agreement.*" But under the old law it was not termination *alone*, but termination *without good cause* which prevented recovery. A donor may therefore still be debarred from recovery if he has not himself terminated the agreement, but behaved in such a way as to justify his fiancée in repudiating it. Recovery will clearly not be available if there is some additional factor which prevents it, such as the rule preventing the recovery of property given in consideration of a future immoral cohabitation.

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[8] *ex rel.* Mr. Staveley Hill, M.P., *ibid.* col. 1888.

[9] Cited in J. Dundas White (1894) 10 L.Q.R. 135.

[10] Law Com. 26, para. 18.

[11] s. 1 (1).

[12] Partly because of the difficulties of definition, but mainly because the system of recovery based on fault would thus be retained: see Report, paras. 22–25.

[13] Because of the practical difficulties of apportioning expenditure, the fear that it would be "using a large hammer to crack a small nut," that it might bring more cases to the courts, and would be unacceptable to public opinion: see paras. 26–33.

[14] *Cohen* v. *Sellar* [1926] 1 K.B. 536; *Jacobs* v. *Davis* [1917] 2 K.B. 532.

[15] Which are not defined; *cf. Elkington* v. *Amery* [1936] 2 All E.R. 86.

(ii) *Property adjustment.* First, as a matter of procedure, the Act applies section 17 of the Married Women's Property Act 1882 [23] "to any dispute between, or claim by, one [*sic*] of them in relation to property in which either or both had a beneficial interest while the agreement was in force" [24] provided that proceedings are instituted within three years of the termination of the agreement. Secondly, it applies the rules relating to husband and wife to the determination of beneficial interests in property acquired during the currency of the engagement.[25] These include, not only the common law rules whereby a beneficial interest in property may be obtained by a direct or indirect financial contribution to its acquisition or improvement, but also the new statutory principle[26] whereby a contribution in money or money's worth to the improvement of property shall, provided it is of a "substantial" nature, confer a proprietary interest. Certain special problems may arise in the case of property acquired during an engagement. First, the rules only apply *if* the agreement is terminated: if a fiancé gives up his job as a bricklayer to carry out improvements on his fiancée's house, and is then adjudicated bankrupt, the trustee in bankruptcy will not be able to rely on the Act to claim a beneficial interest in the house for the benefit of creditors. Secondly, the rule applies *however* an engagement is terminated, so that if the bricklayer-fiancé dies (rather than becoming bankrupt) his share in the property will pass under his will or intestacy, not necessarily to his fiancée. Thirdly, although the Act applies the same rules as are applicable to husband/wife disputes, it does not confer any power to vary those strict rights in the interest of the parties or their children.[27] If our bricklayer married his fiancée, had children and then deserted her, the court[28] could order his share in the matrimonial home to be settled.[29] If, however, he failed to marry her, he could call for his share of the proceeds of sale of the house, and could not be compelled to make any capital provision for his children. Fourthly, the rules only apply to interests acquired during the currency of the engagement: it may, therefore, still be important to know at what moment of time the agreement came into being.[30] Difficulties may be found in deciding whether a so-called "unofficial engagement" is "an agreement between two persons to marry one another." It is now impossible to resolve this problem by asking whether it was the parties' intention to be legally bound by the agreement,[31] since such an intention would be meaningless. It is submitted that in most cases an unofficial engagement is an agreement to marry, even if the parties reserve the right to resile from it. Finally it should be noted that the summary procedure under section 17 of the Married Women's Property Act 1882 is only applicable to disputes *between the parties*, and cannot be used by a third party who may have transferred property to them.

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[16] Law Com. 26, para. 45.

[17] s. 3 (2).

[18] Mr. Daniel Awdry, M.P., Standing Committee C Report, February 11, 1970, col. 25.

[19] Mr. Leo Abse, M.P., Standing Committee C Report, February 11, 1970.

[20] *Cf. Moate* v. *Moate* [1948] 2 All E.R. 486.

[21] Although it follows the Law Commission's draft.

[22] s. 3 (1), italics supplied.

[23] as extended by s. 7 of the Matrimonial Proceedings (Property and Maintenance) Act 1958.

[24] s. 2 (2).

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[25] s. 2 (1).

[26] s. 37 of the Matrimonial Proceedings (Property and Maintenance) Act 1970.

[27] *Cf.* s. 17 of the Matrimonial Causes Act 1965; s. 4 (*c*) of the Matrimonial Proceedings and Property Act 1970.

[28] In proceedings for divorce, nullity and (after December 31, 1970) judicial separation.

[29] *Ulrich* v. *Ulrich and Fenton* [1968] 1 W.L.R. 180; *Smith* v. *Smith* [1970] 1 W.L.R. 155.

[30] It may also be important for the application of the presumption of advancement: *Moate* v. *Moate* (*supra*), and, possibly, the doctrine of undue influence: *cf. Zamet* v. *Hyman* [1961] 1 W.L.R. 1442; *Re Lloyds Bank* [1931] 1 Ch. 289.

[31] *Cf.* Bromley, *Family Law* (3rd ed.), p. 19.

(iii) *Recognition for void marriages.* The action for breach of promise found a strange utility in *Shaw* v. *Shaw.*[32] The plaintiff had gone through a marriage ceremony which, unknown to her, was void since her husband was, at the time, married to a third party. After his death, the truth came out, so that she was entitled to nothing on his intestacy. She recovered damages, based on the amount to which she would have been entitled on intestacy as his widow, on the grounds that he was in breach of a continuing warranty that he was free to marry her, and also for breach of the promise of marriage which he could lawfully have performed when his first wife died some two years before his own death. As a result of the abolition of the action she would no longer be able to sue. The Act deals with this problem by bringing a person who has, in good faith, entered into a void marriage with a person who, at his death, was domiciled in England or Wales, into the class of dependants who can claim reasonable provision out of the deceased's estate under the Inheritance (Family Provision) Act 1938. This marks a further swing towards imposing support obligations on the basis of *factual* (rather than strictly *legal*) family ties; the same philosophy underlies the Family Law Reform Act 1969 which to a large extent equates illegitimate and legitimate children for purposes of succession rights. It will soon have to be decided whether some direct recognition should not be given to purely factual dependency—such as that of a man and his mistress. It should be noted: (i) the new provision only applies if the " marriage " were not dissolved or annulled during the deceased's lifetime. If it had been so dealt with by an English court, the survivor would already have both a right to maintenance *inter vivos*, and a right to apply for reasonable provision out of the deceased's estate under the provisions of section 26 of the Matrimonial Causes Act 1965. If a foreign court (whose decree was recognised here) had made the order, there would be no right to apply for maintenance in England either *inter vivos* or after death. That still remains the law. (ii) The right only exists if the survivor has not remarried; any order for provision out of the estate must determine if the survivor remarries. This follows the principle which the Law Commission has now adopted for all forms of financial provision.[33] (iii) For this purpose, a survivor has remarried even although that marriage is by law voidable or void.[34] This is inconsistent in principle with the recent decision[35] that a daughter whose voidable marriage had been annulled had nevertheless " never been married " for the purposes of the Inheritance (Family

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[32] [1954] 2 Q.B. 429

[33] Law Commission: Report on Financial Provision (Law Com. 25), para. 14.

[34] s. 6 (4).

[35] *Re Rodwell* [1969] 3 W.L.R. 1115.

Provision) Act. (iv) Although the claim is made under the 1938 Act, the new Act makes it a prerequisite that the court be satisfied "that it would have been reasonable for the deceased to make provision for the survivor's maintenance." [36] As the explanatory note to the Law Commission's draft bill [37] states: "This repeats the wording of section 26 (2) (*a*) of the Matrimonial Causes Act 1965 (relating to maintenance from the deceased's estate for a former spouse)." Tantalisingly, however, it was not said why it was thought necessary to introduce this requirement: the Inheritance (Family Provision) Act [38] gives power to make an order only if the court is of opinion that the disposition of the deceased's estate "is not such as to make reasonable provision" for the dependant; all that the present reference would seem to do is to cloud even further the relationship between the 1938 Act's provisions and those of the 1965 Act.[39] (v) The Act applies whenever a void marriage is contracted in good faith (a term which is apparently intended to indicate that a subjective test should be applied),[40] and not only to cases like *Shaw* v. *Shaw* where it was void for bigamy. Thus, if a union like that in *Park* v. *Park* [41] is held to be void on the ground of the deceased's insanity at the date of the marriage, it would now be open to the "wife" to apply for reasonable provision to be made for her out of his estate. This is a welcome innovation, given that the issue was essentially about the division of the deceased's property, and only incidentally about his capacity to form a meaningful matrimonial relationship.

(iv) *Immigrants' marriages.*[42] The Act unfortunately fails to deal with another unusual but useful application of the action. In *Sowa* v. *Sowa* [43] a man had contracted a potentially polygamous marriage in Ghana; he had also given his bride a ring and a Bible which, by the custom of the Ga tribe to which both belonged, betokened a promise to convert the marriage into a monogamous one by a subsequent ceremony under the marriage laws of Ghana. He failed to do so, and neglected to maintain his wife. No matrimonial relief was available in England to the wife because of the rule in *Hyde* v. *Hyde* [44]; it was suggested, however, that she might successfully bring proceedings for breach of promise.[45] Under the new Act she could no longer do so. One may hope that the bar on relief in polygamous unions will soon be abolished,[46] but it is unfortunate to remove one of the few ways in which relief may be obtained. Paradoxically, the Act leaves available the possibility of an action for breach of a marriage contract brought by or against someone who is not a party to the marriage: it is not uncommon in some parts of the Commonwealth for a contract to be made between the girl's father and the bridegroom,[47] whereby for example the father agrees to provide financial benefits. Section 1 (1) of the Act cannot prevent an action being brought on such a contract because it would not be an "agreement between two persons to marry one another." It would of course be necessary for the courts to decide whether there is any principle of public policy which should prevent the enforcement of such an agreement.[48]

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[36] s. 6 (2).

[37] note to cl. 4, Law Com. 26.

[38] s. 1 (1) (*d*).

[39] see *Re Bellman* [1963] P. 239; *Roberts* v. *Roberts* [1965] 1 W.L.R. 560; *Re Harker Thomas* [1969] P. 28; *Re Goodwin* [1969] 1 Ch. 283. The Law Commission is considering this problem in its work on Family Property law: see Law Com. 26, note 55.

[40] Law Com. 26, para. 50.

[41] [1954] P. 112: deceased's relatives sought to attack validity of his marriage on the ground of his insanity, so as to deprive his "widow" of her share on his intestacy.

[42] For an outline of some of the problems see (1968) 118 New L.J. 777 (Cretney).

[43] [1961] P. 80.

[44] (1866) L.R. 1 P.D. 130.

2. *Damages for adultery*

Although the Law Commission favoured the abolition of the husband's right to claim damages for adultery [49] it was recognised that this was essentially a social question on which opinion was likely to be divided. Those who shared the view of McCardie J.[50] that "beneath this technical and somewhat sordid basis there lay perhaps a cogent moral foundation" based their arguments on two grounds: first, the action was a deterrent. Its abolition, it was claimed,[51] would be seen as "an open sesame to some rich philanderer, who would be able to cruise past the factory gates in his leather upholstered Rolls Royce and importune away the prettiest wife at the works with diamonds and, doubtless, some Black Magic." Secondly, the right to bring the action gave a sense of satisfaction to the wronged husband. Thirdly, the action provided a way in which, by the exercise of the court's power to order a settlement of damages, the children of the broken marriage could be provided for. These arguments were not convincing: any deterrent value was unproved, and a claim frequently brought great bitterness into a divorce action. Awards of damages were made so rarely as not to provide any adequate basis of compensation for the breakdown of a marriage, and were normally so small as not to constitute an effective provision, particularly since quantum would not depend on whether or not damages were to be so applied.[52] The right of action thus disappears. Yet nothing has been done about the rule of practice whereby, (although awards of costs are in the discretion of the court) a co-respondent is normally ordered to pay the costs of the action.[53] This principle, which apparently enjoys the support of the Law Commission,[54] is based on the view that " the man whose adultery had made it necessary for the petitioner to institute proceedings should pay the costs of them . . ." [55] or that " one engages in illicit sexual intercourse at one's peril." [56] It is difficult to reconcile this view with the policy of the Divorce Reform Act 1969. If a co-respondent is guilty of causing the breakdown of the marriage then it may be legitimate to fix him with the costs of the proceedings, even although this could exacerbate the bitterness of the proceedings; but it is now accepted that the commission of acts of adultery is usually a symptom, rather than a cause of marital breakdown. There seems no valid reason why a man who has in no way " made it necessary " for the petitioner to bring proceedings should be faced with a heavy bill for perhaps a single act of adultery. It is already tempting for the man who could petition on one of the separation grounds under the Divorce Reform Act nevertheless to rely on adultery (particularly since the bars to relief on this ground no longer exist in their traditional form): this avoids the application of the provisions designed to protect the wife's financial position contained in sections 4, 5, and 6 of the Divorce Reform Act. It is even more tempting if he can fix the whole liability for costs on a third party.

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[45] An action would (*semble*) lie whenever the marriage ceremony was ineffective and one party refused subsequently to regularise the position. For another illustration see the recent decision of the High Court of Kenya, *Case* v. *Ruguru* [1970] E.A.L.R. 55 (H purported to marry his African servant by customary law—ceremony ineffective—action for breach of promise said to be available, see *per* Miller J. at p. 60).

[46] See Law Commission Published Working Paper No. 21, *Polygamous Marriages*.

[47] *e.g.*, *Mistry Amar Singh* v. *Hasara Singh* (1946) 13 E.A.C.A. 18 (Court of Appeal for Eastern Africa). *Cf.* however the Indian authorities cited in B. N. Gooderson "Turpitude and Title" [1958] C.L.J. 199, 202, and Patra, *Indian Contract Act* (1966), pp. 495 *et seq.*, and the Dowry Prohibition Act 1961.

[48] *Cf. Shahnaz* v. *Rizwan* [1965] 1 Q.B. 390, *per* Winn J. at p. 401.

[49] Law Com. 25, paras. 99 *et seq.*

[50] In *Butterworth* v. *Butterworth* [1920] P. 126, 133; the most recent case in which there has been a discussion of the principles underlying the action is *Pritchard* v. *Pritchard and Sims* [1967] P. 195 (note particularly *per* Scarman J., *arguendo*, at p. 195, giving details of contemporary (unreported) awards.

[51] Mr. Leo Abse, M.P., Standing Committee C Report, February 11, 1970, col. 38.

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[52] *Yorston* v. *Yorston and Charman* (1966) 110 S.J. 868.

[53] There is power to condemn him in costs even if he did not know that the respondent was a married woman: *Lycett-Green* v. *Lycett-Green and du Puy* [1956] 3 All E.R. 97.

[54] Published Working Paper No. 9, para. 124; *cf.* Law Com. No. 25, para. 106.

[55] *Rayden on Divorce* (10th ed.) p. 745.

[56] Law Commission, Published Working Paper No. 9, para. 123.

REPORTS OF COMMITTEES

JUSTICE REPORT ON COMPLAINTS AGAINST LAWYERS

THE effectiveness of a legal system and the respect it is accorded depend to a large extent on the integrity and competence of its personnel. The position of the judiciary is obvious, but the key position of the practitioner has not always been recognised. Yet it is the practitioner who has to explain and interpret the law to the individual. The law will fall into disrespect not only by reason of judicial decisions or legislation which the individual does not understand but also if the practitioner fails in his function. The Report by JUSTICE commences with a valuable appreciation of the position of the practitioner in a legal system. It is stressed that adequate communication between the practitioner and the individual will have an important, perhaps decisive, effect on the individual's sense of justice. He sees the lawyer as a representative of " the law " and he is therefore likely to be suspicious of the independence of " the law " unless any complaint he may have is considered with such meticulous care as to satisfy the public's requirements of visible justice, not merely the lawyer's own specialised standards, high though these may be.

The Report grew out of a suggestion that a study should be made of the question whether complaints against members of the legal profession should be investigated by or with the assistance of persons other than lawyers. The actual terms of reference were rather wider. They were:

(a) to inquire into and report on the present methods available for investigating complaints against members of the legal profession;

(b) to report on the adequacy of such methods *from the point of view of the complainant* [1];

(c) to suggest, if necessary, possible improvements.

The Report looks at the problem from the point of view of the complainant, but it is recognised that the identification of lawyers with " the law " works both ways and the lawyer often has to bear the odium created by, for example, badly drafted legislation or slow law reform which are not his responsibility. It is also accepted that the complexity of the law as a whole and the pressure under which lawyers are obliged to work are often the direct cause of delays and inadequate communication both of which lie at the root of most complaints. It is recognised too that account must be taken of the fact that many complaints are without merit and made by disgruntled people who will never be convinced that they have no cause for complaint.

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[1] My italics.

Nevertheless, the Report concludes that a substantial number of complaints are made each year against lawyers and that a significant number of the complainants are left unsatisfied that their complaints have been fully or properly investigated. The Report states [2] that "any person who feels he has grounds for complaint about the conduct of a lawyer should have the right to such an investigation as will lead *either* to a clear explanation why the complaint is not justified *or*, if the complaint is found to be justified, of what remedy is open to him and how it may be obtained, or of what action is being taken with regard to the complaint."

The Report contains a useful account of the working of the existing bodies which may investigate complaints against lawyers.[3] These bodies are ultimately concerned with professional discipline and this is aimed at protecting the public generally by securing the observance of high professional standards which may involve preventing those who fail to observe those standards from practising. The object is not to provide a complainant with a remedy or to punish the practitioner. This is recognised in the Report, but there is a suggestion that this is not enough when it is said that [4]:

> "It is open to question whether the condemnation of a lawyer by his own professional body can be said to be a *remedy* but there is no doubt that it may give some *satisfaction* and, where it is justified, it is clearly necessary for the rigorous maintenance of proper professional standards."

It is apparent, too, in the discussion of the relationship between professional misconduct and negligence.

An action for negligence will principally affect only solicitors. Both branches of the profession regard gross negligence as misconduct but neither will investigate it unless it is likely to amount to misconduct even though it might justify a reprimand or a warning. This is criticised principally on the ground of the difficulties that may attend an action for negligence which may prevent a complainant obtaining satisfaction. The Report is critical too of the view taken by the Law Society that if civil proceedings are likely, disciplinary proceedings should await their outcome. However, bearing in mind the purpose of disciplinary proceedings, the view taken by the Law Society would seem to be reasonable.[5]

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[2] para. 11.

[3] Appendix A.

[4] para. 11. My italics.

[5] It is remarkable that there is no mention of the Compensation Fund administered by the Law Society. The fact that the Report makes no mention of the position of a practitioner faced with disciplinary action, and the safeguards to which he is surely entitled, is no doubt a reflection of the terms of reference. Nevertheless it should have received at least some consideration.

It is clear that generally the Report has no fundamental criticism of the handling of serious cases by the disciplinary bodies. The main criticisms are of the *investigation* of complaints and the main recommendations are aimed at ensuring that the disciplinary function can be more effectively discharged

> "by reason of the existence of a preliminary process which should serve to eliminate wholly unjustified complaints, could lead through a conciliation process to the withdrawal of some complaints and would enable only the more substantial complaints to be brought before the official bodies or directed into civil actions where that course appears to be appropriate." [9]

Both branches of the profession have at present systems of investigating complaints. Thus, though proceedings may be brought before the Disciplinary Committee of the Law Society by a layman without reference to the Law Society, in fact the majority of complaints by members of the public are sent to the Law Society. The Law Society, in common with most professional bodies, takes an active part in the conduct of cases before the Disciplinary Committee and complaints are investigated by its own Professional Purposes Committee. It seems that of the 4,000 to 5,000 complaints made each year to the Law Society about 25 per cent. will be found to involve allegations of negligence and will not be investigated, and that 50 per cent. will be found after investigation to be unjustified. Of the remainder, the more serious will, of course, be brought before the Disciplinary Committee, but others will produce some lesser action such as a warning.

The important fact is that the majority of complaints do not reach the disciplinary machinery proper, but are dealt with in this preliminary process which therefore merits close attention. The resources of the professional bodies are limited so that although they undoubtedly endeavour to investigate complaints thoroughly and impartially it may be that some complaints are not investigated as fully as would be desirable. Investigation may be a lengthy business and though a layman may go direct to the Disciplinary Committee he is likely to be handicapped by inexperience, lack of knowledge and cost. The Report also states that where a complainant wants to have an opportunity of explaining his complaint orally, considerable reluctance is shown to arrange for him to be interviewed, if indeed they will agree to interview him at all.

Further, the investigating bodies vary in the extent to which they give reasons when they reject a complaint. The tendency of the Bar Council and the Law Society is to say as little as possible. A number of complainants feel aggrieved when what they think should be a formal decision of the Law Society, or at least of a committee, appears to be issued as the personal view of an

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[9] para. 42.

Assistant or Secretary, though, as the Report acknowledges, it depends upon the stage at which the complaint is rejected.

Many of these problems involve the question of communication and the Report returns time and again to the view that lack of communication lies at the root of much of the trouble. The original complaint frequently arises from such a failure. There may be a failure on the part of the investigating authorities to keep the complainant fully informed of the progress of the investigation, and finally there may be a failure to provide an explanation of the reasons for rejecting the complaint.

If the present system of investigating complaints needs to be supplemented the problem is how this is to be done. On the one hand the Report grew out of the idea that lawyers were acting as judges in their own cause and that the possibility of introducing laymen into the system should be investigated. On the other hand the Report acknowledges that only lawyers can effectively and speedily undertake the work. But the amount of time which members of the profession can devote to the task is limited and to employ whole-time officials or independent firms of solicitors is costly. The Report concludes that it is essential to use the voluntary services of members of the profession on a broader basis.

It is recommended that each local Law Society should appoint a small Standing Committee to be responsible for the system and also three panels. Panel A would consist of lawyers willing to investigate complaints against members of the profession. Panel B would consist of practising solicitors willing to act in civil proceedings against other members of the profession. Panel C would consist of lawyers and laymen from whom an *ad hoc* Complaints Committee would be appointed. Each such Committee would have a lay chairman and two lawyers, one of whom might be a barrister. If the complaint involves a member of the bar, one member of the Committee at least should be a barrister.[7]

On receipt of a complaint the secretary of the Standing Committee would refer it to the next member of Panel A in rotation and he would then investigate it and as soon as possible he would classify it into one of the following categories:

(a) A case that appears capable of being disposed of by informal intervention and explanation. The aim here is conciliation not judgment. If this fails the complainant will be told that he may either go direct to the Law Society or have the matter considered by the Complaints Committee. Proceedings before the latter would be informal and again aimed at conciliation.

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[7] A suggestion that barristers should come within a system dominated by solicitors is one of the most surprising in the Report, particularly as the Committee which prepared the Report had more barrister members than solicitor members.

(b) A case involving an allegation likely to lead to a civil claim for damages. The investigator will inform the complainant that the next available member of Panel B will act for him on a normal professional basis if he wishes.

(c) A prima facie case of professional misconduct, in which case the investigator would prepare an unbiased summary for the Standing Committee, who might then refer it to the Law Society.

(d) A case too involved or difficult for local treatment, in which case the complainant would be informed that he may himself refer it to the Law Society or that the Standing Committee will do so on his behalf.

A complainant who is dissatisfied can, of course, still make use of the existing machinery. It is recommended that the Bar Council and the Law Society should make arrangements whereby a review body can be appointed to hear any complainant who still remains dissatisfied after his complaint has been investigated by those bodies. This Review Body should include a lay element because in effect the complainant is appealing from a body consisting exclusively of lawyers. It is suggested that it should consist of a lay chairman and generally two other members who may be lawyers and will be appointed on an *ad hoc* basis to consider whether there is a prima facie case for further investigation. If there is, it would request the Bar Council or the Law Society to reconsider the matter. If not, it would give a further explanation aimed at removing the complainant's dissatisfaction.

These recommendations do not affect the existing disciplinary jurisdiction of the Disciplinary Committees of the Law Society and the Senate. The Report does, however, make one comment on the position of the Disciplinary Committee of the Law Society which is not in fact a committee of the Law Society. It is a separate tribunal appointed by the Master of the Rolls under the Solicitors Acts from past and present members of the Council of the Law Society. The Report states that[8] " the public erroneously believe that the Disciplinary Committee . . . is simply a committee of the Law Society and that, as The Law Society is the body which enforces discipline amongst solicitors, the Committee is consequently biased." One would have thought that the real reason for any scepticism on the part of the public was the fact that the Law Society was seen as a kind of solicitors' trade union. But whatever the reason the point is a valid one, and while the independence of the Disciplinary Committee is not questioned, appearances might be thought to call for some greater form of separation from the Law Society. However, it is recommended only that it should be renamed the " Solicitors' Disciplinary Tribunal " and no change in its constitution or function is con-

[8] para. 62.

sidered necessary. Since the Report was published the Law Society has announced the result of its own review and the principal recommendation is the enlargement of the qualification for appointment to the Disciplinary Committee to include senior solicitors and laymen.

There has been much talk in recent years of improving the public image of the legal profession and the Report shows some of the ways in which this can be done, particularly by stressing the importance of good communication with the lay client. If there is a serious failure on the part of the practitioner the client may be able to obtain satisfaction in an action for negligence. Otherwise it is difficult to see what remedy he can be given apart from any satisfaction he may derive from disciplinary proceedings which are not designed with that object. But in the very large percentage of complaints which do not fall into that category the remedy may well consist of satisfying the complainant that his case has been properly dealt with. The machinery proposed in the Report would help to isolate the former and would go a long way towards dealing with the latter.

The Chairman of the Justice Committee has subsequently written that [9] "the crucial matter on which the Justice proposals are likely to stand or fall is the willingness of lawyers to contribute the very moderate amount of voluntary service which would be necessary for the working of the system." He believes that the effort will be forthcoming but whether his optimism is justified remains to be seen. It does, however, appear that the Law Society's own review contains proposals for local machinery to "filter" complaints [10] but as that review has not been made public no comparison is possible.

Gareth Miller.

First P.I.B. Report on Standing Reference on the Remuneration of Solicitors [1]

This Report is not the first by the P.I.B. on the remuneration of solicitors. The Board's original findings and recommendations, published in February 1968,[2] were hotly contested by the profession. As a result, the Government, though broadly accepting the conclusions reached in the Report, decided to ask the P.I.B. to keep the remuneration of solicitors under continuous review. As an initial task the Board was requested to re-examine its original findings in the light of the criticisms which had been made.

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[9] (1970) 120 New L.J. 845.

[10] The Law Society recently sent out a letter to local law societies regarding the possibility of some form of local machinery. See comment in (1970) 120 New L.J. 563. It seems that the Law Society has rejected lay participation in the local complaints process.

[1] Report No. 134, Cmnd. 4217.

[2] Report No. 54, Cmnd. 3529.

A particular matter of inquiry was the effect of S.E.T. which solicitors had argued had not been properly taken into account by the original findings. In the interval between the publication of the two Reports the Board's original proposals remained unimplemented, during the progress of a developing dispute between the Lord Chancellor's Department and the Law Society over the convening of the Statutory Committees responsible for approving changes in conveyancing and county court costs.[3] The Government maintained that solicitors should accept a "package deal" involving county court costs before it would convene a meeting of the Non-Contentious Costs Committee to approve increases in conveyancing charges. Solicitors argued that increased overhead costs necessitated an immediate increase in conveyancing charges while discussions proceeded in relation to the fixing of the other cost scales.

Published in November 1969, the new Report does not depart radically from the original findings. The main survey conclusion is that the median income of principals had risen by 8 per cent. between 1966 and 1968. The Board finds this "not out of keeping" with the prices and incomes policy. It charts the pronounced movement towards amalgamations and larger firms whilst concluding that overall increases in charges in order to support low-earning small firms which are doing useful work are not justified. The adverse effect of S.E.T. is again largely discounted. The Board concedes that, unlike some service industries, solicitors cannot pass on S.E.T. to their clients in the form of a specific surcharge but argues that rises in house prices generally, leading to higher fees, an increasing volume in work and larger solicitor and own client charges all tend to alleviate the effect of the tax. By saying this the Board avoids the necessity for a debate as to the purpose of S.E.T. and its relevance to the profession, especially in relation to the employment of articled clerks.

On the manpower side, the Board implicitly rejects a previous forecast by the Law Society that there was a shortfall in the profession of 5,000 solicitors. It concedes that the increase in the numbers of legal executives has been slow and suggests that there should be more positive encouragement to their recruitment and that of new articled clerks. But, overall, the position is found to be satisfactory whilst stress is laid on the necessity to keep a special watch on specific kinds of need, such as in the fields of litigation and legal advice. The Board again examines the position of county court work and recommends that current gross income from such work, excluding divorce, needs to be increased by £8½ million in order to make such work profitable to those firms doing it in volume. It is also suggested that the fee for legal advice be increased to £4 per hour.[4] However, whilst the Board finds that county court work is extremely unremunerative, it concludes that conveyancing remains highly profitable. In this area, it makes a variety of proposals, the chief ones being that scale charges for properties below £2,000 be increased, and that those for properties above £4,000 and below £20,000 should be reduced by 6 per cent. in total and that all charges should be treated as maxima.[5]

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[3] The progress of this dispute can be traced through successive issues of the *Law Society's Gazette* during 1968–70.

The reference on solicitors is one of the few that the Board has undertaken which deals directly with services. Nevertheless, it is important to read the Report in the light of the Board's general approach to an incomes policy.[6] There has been no attempt to propose a reorganisation of the legal profession or the work that it does. Instead, the approach has been to peg the level of both remuneration and charges in accordance with certain criteria, which have been used in assessing whether increases in charges are justified. It follows from this that the desire of many solicitors to be free of statutory restrictions in regulating charges is likely to remain unsatisfied even if the new Government choose to abolish the Board or replace it with some other method of examining incomes. As a result, the issue of income comparability with related professions is likely to become less important as a determinant than in the days of the publication of the Pilkington Report,[7] except where a strong case can be made out for the existence of a serious shortage of solicitors and a slow rate of recruitment due to low financial rewards. It was perhaps for this reason that the Board took great pains to refute claims concerning manpower shortages. On the contrary, it has continued to stress proposals to encourage solicitors to rationalise their overheads by amalgamations and the creation of large firms; the need to do certain classes of work, such as in the county courts, in bulk and the streamlining of procedures. Where there are special problems, such as in urban areas with a low geographical distribution of solicitors, the Board would be prepared to approve solutions such as the appointment of salaried solicitors to help cover the particular need rather than those involving overall increases which have the effect of raising the remuneration of solicitors generally. It may be that discussions on these subjects which, in the past, have been hampered by the lack of adequate statistical information will be helped by the details of the surveys which have been provided by the Board.

The P.I.B., whilst satisfied with leaving the gross total income of the profession at its present amount, has attempted to redistribute the gross amounts attributable to each class of work so as to eliminate, so far as is possible, cross-subsidisation, *i.e.* to relate charge and expense in each area of work. Solicitors have always pressed for the elimination of the "swings and roundabouts" principle but have taken this to mean that remuneration for contentious work should rise rapidly. The Board is not prepared to take this attitude, though suggesting rises at the lower ends of the scales. In so doing, the new survey is even less imaginative than the original Report which carefully avoided making proposals on a number of crucial issues, being content merely to note them in passing.[8] The most important of these relate to the kinds of work which solicitors perform. At the moment, the cost structure of the profession is underpinned by the remuneration derived from conveyancing.[9] It does not follow that increasing overheads will necessarily be matched by increased charges due to rising house prices especially where the gross number of houses being conveyed during an individual year falls because of a period of economic stringency. Inevitably, higher conveyancing charges (though a solicitor's own charges represent only a proportion of the amount which the client has to pay) will reinforce demands, especially when the land registration system has been extended over the whole of the country, to break the solicitors' monopoly in favour of less qualified persons performing the work in bulk at a greatly reduced charge because of smaller overheads. If this happens, consideration will have to be given to the question of the viability of the profession, as presently organised, if the remuneration derived from conveyancing were removed or reduced.

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[4] In May 1970, the Government announced that they were raising the financial limits determining eligibility for legal aid and increasing the amount paid per hour for legal advice.

[5] Report No. 134, para. 58.

[6] See especially, Brian Easton "P.I.B., an Economist's View" (1968) 118 New L.J., 161, and Second General Report of the P.I.B. Cmnd. 3394, 1967.

[7] Royal Commission on Doctors' and Dentists' Remuneration, Cmnd. 939, 1956.

One consequence of the importance of making non-conveyancing work remunerative is the encouragement to specialisation, especially in county court work, which the Board has attempted to make profitable for those firms undertaking it in sufficient volume.[10] In this respect the Report betrays a confusion of thought, since the P.I.B. appear to recognise that, to a certain extent, increases in county court scales will have the effect of altering the distribution of the amounts paid by the losing party and the solicitor's own client without necessarily leading to an increase in the total amount of costs recovered.[11] One effect is likely to be that an increasing number of potential litigants will stay away from the courts [12] because of the possible cost involved partly as a result of the scales at the lower end being increased. Following the recommendations of the Payne Committee on the Enforcement of Judgment Debts,[13] the Administration of Justice Act 1970 may have the twin effect of streamlining procedures and reducing the volume of work done. Urgent consideration ought now to be given to encouraging solicitors to diversify their areas of work and to fund legal services which at present are unprofitable. It is unlikely that this can be dealt with simply by increasing legal aid limits. It may be that local neighbourhood law centres financed by government funds would fulfil a need in urban areas where the numbers of solicitors remain small.[14] But there is increasing evidence to suggest that such centres will have the effect of generating work for existing legal services, for which they will act as referral agencies, partly due to their need to maintain a high turnover rate of cases with which they are dealing. Finally, there is an important need to examine critically the method of charging and the procedures used or required to be used by solicitors in doing their work. The extension of time-costing and job-costing methods may have important consequences for both the profession and the public.

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[8] *e.g.* Report No. 54, para. 51.

[9] The latest survey finds that 47 per cent. of solicitors' incomes is derived from conveyancing as compared to 56·5 per cent. in 1966. Report No. 134, Table 10.

[10] Report No. 134, para. 35.

[11] As from March 1970 new, more generous county court scales are in operation. See S.I. 1970 No. 204.

[12] See especially, Consumer Council County Court Survey, "Consumers and the Legal System" *Focus*, July 1969, p. 9, by Susan Marsden-Smedley.

It may be that there will be further governmental inquiries in the area covered by the present Report. If so, it is to be hoped that these will concentrate on the diversification and the re-organisation of existing patterns of legal services rather than attempt to redistribute the present gross income of the profession, an attempt which solicitors themselves continue to find unsatisfactory.

C. GLASSER.

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[13] Cmnd. 3909, 1969.

[14] See, *Justice for All*, Society of Labour Lawyers, Fabian Pamphlet, 1968, and M. Zander on Annual Report of the Lord Chancellor's Advisory Committee on Legal Aid (1969) 32 M.L.R. 187.

NOTES OF CASES

Trespass to Air Space and Injunctions—A Pointless Remedy

In *Woollerton and Wilson Ltd.* v. *Richard Costain Ltd.*[1] there was a clash between private property rights and economic reality. The outcome was a victory for economic reality; legal principle and common sense being battered slightly in the process.

The defendants were a firm of building contractors engaged, since October 1969, in constructing a 800-foot-high post office building. Working space on the site was exceptionally limited and the only practical crane which could be used in the circumstances was a tower crane. The jib of the crane, when in operation, swung over the plaintiffs' factory on the other side of the street; when the crane was not in operation it had to be left free to swing, and the wind could also cause it to swing over the plaintiffs' factory. There was a maximum overhang of the jib arm of about fifty feet across the plaintiffs' premises at about fifty feet above roof level. The plaintiffs did not claim that the crane was in any way a nuisance or that they were in fear or apprehension of any damage. They merely issued a writ claiming an injunction and damages and then applied for an interlocutory injunction to restrain the invasion of their air space.

The plaintiffs' claim in law was simple: their property rights had been violated by the trespass and so they were entitled to damages. But as there was no actual or threatened damage it was argued that only nominal damages could be recovered; such nominal damages would be an inadequate remedy, and so a clear case existed for claiming an injunction.[2]

The defendants admitted the trespass. No doubt they would also have agreed with two other propositions. First, the plaintiffs had a right to refuse to allow the defendants to go on or over their land: in the absence of statutory authority[3] or private agreement they had no right to enter and the court had no inherent jurisdiction to grant a licence to the defendants over the plaintiffs' land. Secondly, the position cannot be affected merely because the plaintiffs are unreasonable or malicious in withholding their licence.[4] The law has been stated thus:

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[1] [1970] 1 W.L.R. 411; [1970] 1 All E.R. 483, Stamp J.

[2] It is not the purpose of this note to discuss the question of nominal damages. However, it is submitted that the learned judge was wrong if he assumed that in an action for trespass, unless actual damage can be shown, only nominal damages can be awarded. There is power to award substantial damages and it should have been possible to award them in this case. See Street, *Principles of the Law of Damages* (1962), pp. 14–18.

[3] *e.g. Cartwright* v. *Post Office* [1969] 2 Q.B. 62 (C.A.).

> ". . . (i) If A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered."[5]

How, then, could the defendants avoid submitting to an injunction and to all the economic consequences which would follow. There was uncontradicted evidence that if the tower crane was required to be removed, all building operations would be brought to a halt, it would be necessary to redesign the building and the contract period might be extended by twelve months. The result was awaited with interest and concern by the construction industry, and the judge was obviously not unaware of the implications.

The defendants could have argued, no doubt, that there was in fact no trespass to the plaintiffs' land. A landowner can no longer rely upon the ancient maxim *cujus est solum, ejus est usque ad coelum et ad inferos* and so claim a right to all the air space above his land: it is now generally accepted that at common law the only claim is to that part of the air space above land which is requisite for the proper use and enjoyment of the land.[6] Even so, it has been held that a land-owner could sue persons who were using a firing range where bullets passed some seventy-five feet above the surface of the land without striking the plaintiff's land.[7] Perhaps the defendants rightly conceded trespass to air space.

The only other arguments which the defendants could raise were based on economics and past practice. First, the importance and cost of the project—this in itself may be relevant in deciding whether the tort of nuisance has been committed but it has no legal significance when the action is for trespass. Secondly, the fact that the defendants had offered the plaintiffs £250, but that they had indicated that they might only be prepared to consent for £50 a week—here, too, the judge accepted that the plaintiffs were entitled to exploit to the full the fact that the air space in which the jib of the crane swung had by reason of the defendants' vital requirements suddenly assumed a very artificial value. Thirdly, the evidence on behalf of the defendants that on no previous occasion had any neighbouring proprietor, over whose property the jib of a tower crane had passed, sought to obtain an injunction or claim compensation, and also that neighbouring owners had always previously been satisfied with insurance cover against the possibility of any damage being caused, although no claims had ever been made against such insurance cover. This, again, was not a convincing legal argument.

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[4] *Cf.* the famous remarks of Lord Halsbury L.C. in *Bradford* v. *Pickles* [1895] A.C. 587, 594: "If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it. Motives and intentions in such a question . . . seem to me to be absolutely irrelevant."

[5] *Pride of Derby Angling Association* v. *British Celanese Co.* [1953] Ch. 149, 181 *per* Sir R. Evershed M.R.

[6] *Kelsen* v. *Imperial Tobacco Co.* [1957] 2 Q.B. 334.

[7] *Clifton* v. *Viscount Bury* (1887) 4 T.L.R. 8.

The judge, therefore, having examined the authorities decided that an injunction should be granted; but that its operation should be suspended for one year until the end of November 1970, that is, the estimated date for completion of the building; and further, that if the job was not finished by this date, application could be made to extend the suspension of the order. "I am conscious that by so doing I am giving with one hand and taking away with the other. But by so doing I give effect to the process by which I have come to my conclusion that in principle there ought to be an injunction but on the particular facts of this case not until the defendants have had a proper opportunity of finishing the job." [8]

Thus, the court, in deciding ostensibly in favour of the plaintiffs, was able to give complete satisfaction to the defendants. How was the learned judge able to justify this order? It is well known that an injunction, being an equitable remedy, is discretionary, although the discretion is exercised in accordance with well-established principles. Therefore it is permissible to take into account factors in the exercise of a discretion which are not in themselves decisive in law. Among the factors which Stamp J. took into account in exercising his discretion were the following: first, the fact that the plaintiffs had been offered a substantial sum so that when they started the action they were not in the position of a plaintiff whose only remedy other than an injunction was nominal damages; secondly, the court may consider the behaviour of the parties [9]; thirdly, the air space in question had only assumed any value at all by reason of those particular defendants' necessities; fourthly, the defendants had got themselves into this position "not by any flagrant disregard of the plaintiffs' proprietary rights but by inadvertence."

With respect, these factors are more appropriate to deciding whether or not an injunction should be granted not whether it should be suspended. The effect of the suspension is not only paradoxical, but also makes nonsense of established legal rights. How does one attempt to explain this decision to the plaintiffs? The plaintiffs have been given a remedy to establish their

[8] [1970] 1 W.L.R. 411, 416; [1970] 1 All E.R. 483, 487.

[9] Was the plaintiffs' action necessarily improper? The learned judge thought that to ask £50 a week was unreasonable and holding the defendants to ransom. But when one sets this cost against the total cost of erecting a 800 foot high building it becomes far less significant: the plaintiffs may well dislike the idea of such a building being erected and did complain of the congestion caused in the street; the defendants' obvious capacity to pay might help to sweeten the pill.

right, but the remedy is delayed in order for it to be totally ineffective. If such a remedy is ineffective have they any other remedies open to them? Since the defendants are admittedly trespassing, is it possible for the plaintiffs to exercise their remedy of self-help and take steps to obstruct the crane passing over their air space? Can the plaintiffs erect a one hundred foot high mast on their building, even though it will obstruct the trespassing crane? It has been said that a person in possession of land may cut and remove an unauthorised telegraph or other electric wire stretched through the air above his land, at whatever height it may be, and whether he can show that he suffers any harm or inconvenience from it or not.[10] If this is so, then all that might prevent the plaintiffs from interfering with the jib of the crane would be the argument that recourse to the court precludes the plaintiffs from exercising their remedies of self-help, for which proposition there appears to be little authority [11]; or the argument that an attempt to do something contrary to the court order would be a contempt of court. Contempt of court, however, is normally applicable if the unsuccessful defendant disobeys the order made against him, not against a plaintiff who is merely trying to reinforce his ineffective legal remedy. It seems unlikely, however, that a court would permit the plaintiffs to disregard the effect of the injunction in this way, although it is difficult to see precisely on what grounds.

If the injunction must be obeyed—by the plaintiffs—then there are even more curious implications. The learned judge admitted that the effect of *refusing* an injunction would be to give a licence to continue the tort of trespass in return for a nominal payment. The granting of this kind of injunction must have the same effect: the defendants have been granted some kind of licence to enter the plaintiffs' air space; but what kind of licence can it be? Clearly, it binds the plaintiffs and presumably has the same force as far as they are concerned as a contractual licence, even though there is no contract or consideration. What would happen, however, if the plaintiffs sold their land, before the defendants' building work was finished, to a purchaser who took with notice of the situation? Would he also be bound by the scope of the injunction? Presumably he must be. The character of the licence, then, becomes even more peculiar. It will be effective not only against the plaintiffs but also against third parties. This begins to give it the appearance of a proprietary, rather than a personal, interest in land. Recently equity has been developing a new kind of proprietary interest out of certain kinds of licence based upon estoppel.[12] This, unintentionally, may have the same characteristics.

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[10] *Salmond on Torts*, 15th ed., p. 55; *Wandsworth Board of Works* v. *United Telephone Co.* (1884) 13 Q.B.D. 904, 927.

[11] A final judgment may destroy a right of action. Further, it may be that a right in respect of which a person sues is merged in the higher and better right which he obtains by his judgment, even though it be unsatisfied. However, in this case the defendants are committing new trespasses every time the jib enters their air space; this does not seem to be covered by the original action. *Cf. Redland Bricks* v. *Morris* [1969] 2 All E.R. 576, 578, *per* Lord Upjohn.

The main criticism of this decision is that the form of judgment is such that, in an indirect way, the court has in effect forced a plaintiff, against his will, to grant a licence over his land, even though no legal justification could be given for this. Of course, from the point of view of economic sense the outcome of the decision was sound. A more acceptable decision might have been to refuse the plaintiffs an interlocutory injunction and leave them free to pursue their action for damages, which, it is submitted, should be more than nominal and should reflect a payment by the defendants for the use of the plaintiffs' air space. What is unpalatable is that the common law should acknowledge that an Englishman's home is his castle, and yet expressly permit an intruder who has entered through the back window to remain until he has completed his purpose.

What significance does this case have for the building industry for the future? It can take little comfort from the sympathetic attitude shown to the defendants. The learned judge stated:

> "A contractor in the future will be warned not to enter into a building contract involving the erection of one of those cranes in such a position as to swing over the land of an adjoining owner without first obtaining permission from that adjoining owner. Much has been made in this case of the importance of work being done by the defendants; but if I had thought that the defendants in this case had deliberately proceeded on the footing that the importance of the work would prevent the court from granting an injunction, I would have made [a different order]."[13]

This statement means, therefore, that even though private rights were not fully protected in this case, they will be in future, and that owners of land can grant or withhold permission at their discretion. If landowners are in future placed in the position of the plaintiffs, they may refuse permission or ask £50 or £500 per week and it would still be unwise for contractors to go ahead and ignore even unreasonable demands. This is a serious problem for the construction industry which, in some cases, could be held up to ransom. But this is not a new kind of problem. In all sectors of our society, where it is demonstrated that the social need outweighs the complete preservation of private rights statutory procedures have been introduced to enable the social need to prevail while safeguarding or compensating the private individual.[14] What is needed here is legislation which enables contractors to use the air space over other land, subject to necessary safeguards and compensation if necessary. Until such urgent legislation is introduced individuals should still feel that their legal rights are satisfactorily safeguarded in our courts.

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[12] See *Ives Investment Ltd.* v. *High* [1967] 2 W.L.R. 789; Crane, "Estoppel Interests in Land" (1967) 31 Conv.(N.S.) 332.

[13] [1970] 1 W.L.R. 411, 416.

[14] *Cf. Goodson* v. *Richardson* (1874) 9 Ch.App. 221, 224.

GERALD DWORKIN.

STATUTORY AUTHORITY AND RYLANDS *v.* FLETCHER

IN *Benning* v. *Wong*,[1] the plaintiff's declaration included a count under *Rylands* v. *Fletcher* for damages caused to her as an occupier of land by the escape of gas from mains in the neighbouring street operated by the defendant under statutory powers. The defendant demurred to this count on the ground that it disclosed no cause of action, because it did not allege negligence in the exercise of the statutory power. The pleading point is important because it determines the onus of proof—plaintiff to establish negligence, or defendant to negate it? There have been hundreds of decisions of courts in the Commonwealth common law world on closely analogous questions, including dozens from courts of the highest authority, and in many of these cases questions of the onus of proof have been considered, but this may be the first in which that question has been isolated from all other issues, so that a decision on it was critical and the relevant opinions accordingly could have provided authoritative guidance, on the narrowest view of a *ratio decidendi*. Unfortunately, the judges were sharply divided; the prevailing opinions in favour of the defendant, throwing the onus of proof of negligence on the plaintiff, do not provide an authoritative general principle, and there are grounds both of analysis and of policy for preferring the dissent.

In the Supreme Court, Wallace P. and Jacobs J.A. held for the plaintiff; Walsh J.A. (since appointed to the High Court) dissented. In the High Court, McTiernan, Menzies and Owen JJ. reversing the decision below, held for the defendant while Barwick C.J. and Windeyer J. dissented. The analysis of cases in these opinions discloses many conflicts and inconsistencies in the previous decisions, and no judge had much difficulty in distinguishing, or exposing as mere *obiter*, opinions which apparently stood in his way. However, in what Upjohn J. called " this rough sea of authority " (*Smeaton* v. *Ilford Corporation* [2]) one can distinguish two tendencies which potentially lead to conflicting conclusions. In cases where a *Rylands* v. *Fletcher* claim was undoubtedly in issue, whether alone or in conjunction with a nuisance claim, there is a preponderance of dicta (though no clearly authoritative decision) favouring the view which here prevailed. High Court authority is particularly prominent on this aspect of the matter, including dicta of the revered Sir Owen

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[1] (1968) 88 W.N. (2) N.S.W. (Appellate Div., Supreme Court of New South Wales); (1969) 43 A.L.J.R. 467 (High Court of Australia).

[2] [1954] Ch. at p. 478.

Dixon; see especially *Cox Brothers (Australia) Ltd.* v. *Commissioner of Water Works.*[3] On this view, if the activity prima facie creating a "*Rylands* v. *Fletcher* situation"—a phrase much used in these opinions—is specifically authorised by statute, as with the running of gas under pressure through street mains considered in this case, then that head of liability disappears from consideration; the statutorily authorised defendant can be liable only if shown by the plaintiff to have been careless. But in a large number of cases where the sole or main issue was liability in *nuisance*, the dicta have favoured the view that the *defendant* must show that the infliction of the injury was the unavoidable consequence of the exercise of the statutory power, and this involves showing that the power was exercised with reasonable skill and care both *generally*—(the "system")—and *in the particular instance.* At least one of these cases—*Manchester Corporation* v. *Farnworth*[4]—is a direct and unambiguous decision squarely in point. On this theory as applied to *Rylands* v. *Fletcher* cases, there is no anomaly (as mistakenly suggested by Menzies J. in the instant case) in having an investigation of due care during trial of a strict liability issue; due care is relevant solely as one of the conditions of the claimed statutory protection, and the failure of a defendant to establish it leaves the plaintiff to proceed on the strict liability basis.

Walsh J.A. in the Supreme Court amply demonstrated that as a matter of authority binding that court he must hold for the plaintiff, and, with respect, he was plainly right. The opinion of Jacobs J.A. in that court can be disregarded; he suggested as a means of reconciling the cases that only non-profit-making public utilities should have the advantage of the rule throwing the onus on a plaintiff, while commercial concerns (such as the present defendant) should have the onus of showing due care in the exercise of statutory powers. There are faint suggestions of such a doctrine in a few early cases, but nothing like adequate authority and as a matter of policy there is no good reason for so handicapping the individual plaintiff in his jousts with collectivised service industries. Wallace P. worked out the line of analysis which was adopted in substance by the High Court dissentients, and which involves applying the "nuisance" line of authority to *Rylands* v. *Fletcher* claims as well.

In the High Court, McTiernan J. disposed of the case on a simple statutory basis; he interpreted the relevant Acts as themselves establishing a presumption that the transmission of gas is inevitably accompanied by leaks, so that liability must require proof of carelessness in the particular instance. This is a tenable inference, and if adopted would bring the gas mains situation into line with another well-established special category—the cases on emission of sparks by steam railway locomotives. However, such an approach provides no help for the general problem, and even in its own field becomes less and less sensible as the relevant Acts recede into the past. Probably any generalised rule attempting to distinguish between " care as to system " and " care in the particular instance " would be unworkable, and it seems better to bury the railway cases along with the spark-emitting locomotive. Menzies and Owen JJ., though not mandatorily bound as Walsh J.A. was in the court below, followed in substance his view, and can probably be taken as endorsing the theory that for this purpose nuisance claims are in a separate category. The contrary view that there is no relevant distinction between nuisance and *Rylands* v. *Fletcher*, and that the approach dominant in the nuisance cases should be applied to both, is argued with great force in the High Court dissents; Barwick C.J.'s opinion brings out the points of fundamental rule analysis with especial clarity, and Windeyer J. emphasises the historical aspect and the considerations of juristic technique which make the prevailing opinions seem pedantic and lacking in juristic insight. However, the dissentients might have made more of the practical consideration that " public utilities " generally, whether commercial or collectivised, are usually in a far better position to produce to the court the information relevant to informed decision than the citizen plaintiff is likely to be.

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[3] (1933) 50 C.L.R. 108.

[4] [1930] A.C. 171 (H.L.).

The judges all held that damages for personal injuries are recoverable under *Rylands* v. *Fletcher*, refusing to apply dicta of Lord Macmillan in *Read* v. *J. Lyons & Co. Ltd.*[5] which suggested that only property damage was recoverable. They considered the force of " nuisance clauses " in such legislation; that in the Acts here relevant was of minimal importance, for reasons most clearly explained by Walsh J.A. They agreed in finding the distinction between empowering legislation and legislation imposing a duty to provide a service, to be of little relevance—because, as Menzies J. put it, " statutory powers are given to be exercised."

G. SAWER.

NATURAL JUSTICE YET AGAIN

THE Court of Appeal in *R.* v. *Gaming Board for Great Britain, ex p. Benaim and Khaida* [1] has helped to show up the inadequacies of the present rules of natural justice.

Two French nationals who in 1967 took up residence in the United Kingdom contracted to buy the controlling shares in Crockfords, and later became joint managing directors of the club. They applied to the Gaming Board for a certificate of consent to entitle them to apply for a licence for the premises, as required by the Gaming Act 1968.[2] At a four-hour interview with the board in December 1969, the applicants were asked, and answered, a wide range of questions based on information already in the board's possession, though its source and detailed content were not disclosed to the applicants. They were then invited to supply further information in writing and did so; but on January 9, 1970, the board refused the certificate. Further requests to the board to indicate which of five specified matters[3] still troubled the board, and to consider a new or amended application were unsuccessful, although the applicants were again invited to make further representations on any matters considered relevant. On February 24, the board confirmed their refusal and declined to state their reasons.

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[5] [1947] A.C. at p. 173.
[1] [1970] 2 W.L.R. 1009.

The applicants moved the Court of Appeal for orders of certiorari to quash the board's decision and of mandamus to require the board to give them sufficient information to enable them to answer any case against them, on the ground that the board had acted unfairly and contrary to natural justice in a matter which would deprive the applicants of valuable rights of property. The Court of Appeal refused their applications.

Lord Denning, delivering the judgment of the Court of Appeal (Lord Denning M.R., Lord Wilberforce and Phillimore L.J.), agreed that the rules of natural justice applied, but went on to say that it was not possible to lay down rigid rules as to their scope and extent. So far so good. Since the applicants, however, were not being deprived of a right but merely of a privilege,[4] then the board need do no more than act fairly, which it had done.[5] This is "sterile conceptualism,"[6] which does little to solve a difficult problem of administrative law, that of defining the principles under which licensing authorities should be controlled by the courts.[7] The position in the United States Federal courts is that where the facts in dispute are adjudicative facts relating to the particular individual, an applicant for a licence is always entitled as a matter of due process to a trial type of hearing. Where the facts are general or legislative, a tribunal often may properly find them without providing opportunity for a trial type of hearing.[8]

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[2] s. 11 (1) and Sched. 2.

[3] [1970] 2 W.L.R. 1009, 1014.

[4] *Ibid.* at p. 1016.

[5] *Ibid.* at p. 1017.

[6] The phrase is Professor de Smith's: see *Judicial Review of Administrative Action* (2nd ed. 1968), pp. 208–211, 396–397. For a recent judicial condemnation, see Barwick C.J. in *Banks* v. *Transport Regulation Board* [1968] Argus L.R. 445, 448–450 (High Court of Australia).

[7] See de Smith above and references therein cited.

[8] K. C. Davis, *Administrative Law Treatise* (1958), 493–497; Gellhorn and Byse, *Administrative Law* (4th ed. 1960), 751–755; *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 (1926).

Furthermore, Lord Denning took the board's obligation to "act fairly" from *Re H. K. (An Infant)*,[9] a leading case on immigration law. There Lord Parker C.J. said that "even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly."[10] Subsequent decisions on the admission of Commonwealth immigrants have shown how easy it is for the courts to narrow the meaning of "acting with fairness" to the point of extinction.[11]

Yet another point is that through the board's failing to specify which of the statutory criteria[12] the applicants failed to satisfy, the reputations and future business activities of the applicants were put at risk. It is suggested that the board should have been compelled to spell out its objections against the applicants in detail.[13] Lord Denning, however, thought that it was sufficient that the board should give its general impressions to an applicant so that he can disabuse them.[14]

Finally, Lord Denning held that the board was not bound to give reasons for its decisions.[15] Since magistrates are not bound to give reasons for their decisions,[16] neither should the Gaming Board be bound. The analogy is a false one. Surely the board resembles more a tribunal than a court of law, and many important tribunals have a statutory duty to supply reasons when requested under the Tribunals and Inquiries Act 1958.[17] What is urgently needed is an extension of section 12 of the Act to cover all judicial and administrative decisions: a similar solution has been adopted in several other countries, including the United States.[18] However elastic the rules of natural justice may be, they should surely include the giving of full and proper reasons for a decision.[19]

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[9] [1967] 2 Q.B. 617.

[10] *Ibid.* at p. 630.

[11] *R.* v. *Secretary of State for Home Affairs, ex p. Harnaik Singh* [1969] 1 W.L.R. 835; *R.* v. *Secretary of State for the Home Department, ex p. Akter Singh*, July 25, 1967 (unreported); *R.* v. *Home Secretary, ex p. Dhillon*, *The Times*, December 21, 1968.

[12] Gaming Act 1968, Sched. 2, para. 4 (5) (6).

[13] I have been unable to find any authority to this effect. The question usually arises in relation to notification of the charges or accusations made *before* the hearing: see *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B.(N.S.) 180; *Ridge* v. *Baldwin* [1964] A.C. 40. After the hearing the analogy is with the giving of reasons.

[14] [1970] 2 W.L.R. 1009, 1017.

[15] *Ibid.* at p. 1018.

[16] *R.* v. *Northumberland Compensation Appeal Tribunal, ex p. Shaw* [1952] 1 K.B. 338, 352.

[17] s. 12 and Sched. 1.

[18] Administrative Procedure Act 1946, s. 8.

[19] For a recent discussion, see an article by Michael Akehurst (1970) 33 M.L.R. 154.

The decision in *Ex p. Benaim and Khaida* means that Crockfords faces extinction and that the applicants are deprived of their livelihood. However unsympathetic one may be to their mode of earning a living, that alone is no reason for effectively preventing them from so doing in this country.

WILLIAM BIRTLES.

CONSUMER PROTECTION AND THE GUILTY EMPLOYEE

IN *Beckett* v. *Kingston Bros. Ltd.*[1] the question was posed of the circumstances in which the owner of a chain of retail shops could escape liability for a "consumer protection" offence, with the excuse that the real offender was a named employee within his organisation.

The Trade Descriptions Act 1968[2] seeks to protect consumers by, *inter alia*, penalising anyone who, in the course of trade, supplies any goods to which a false trade description has been applied. The defendants were multiple butchers who purchased a consignment of turkeys. A misunderstanding arose as to the country of origin of the birds: when delivered to the defendants' shops, each bore a polythene wrapper with the words "Norfolk King Turkey," although the birds were of Danish origin. The defendants realised that this error must be remedied, and forthwith supplied to their branches labels bearing the word "Danish." They gave the most urgent instructions to their area managers to ensure that the amending labels were used.

The manager of the Basildon branch of the organisation failed to carry out these orders, with the consequence that one of the offending turkeys was sold incorrectly labelled.

On these facts the defendants were prosecuted before the Billericay justices. They relied at the hearing upon a special "third party" defence open to them under section 24 of the Act, if they could establish:

> "... (a) that the commission of the offence was due to the act or default of another person ... and
> (b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control."

The defendants alleged that the commission of the offence was due to the failure of the shop manager at their Basildon branch, and that they had exercised all due diligence to avoid its commission by organising a special system to correct the misleading wrapper: that this system had functioned down to the level of the branch in question, where it had been stultified by the failure of the shop manager.

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[1] [1970] 2 W.L.R. 558.

[2] s. 1 (1) (b).

The justices were impressed with the evidence of the defendants' managing director, as to the steps he had taken to comply with the Act, and to safeguard the firm's good name: they were therefore satisfied that a defence under section 24 had been made out, and dismissed the information.

Before the Divisional Court, the appellant argued generally that section 24 was only intended to give relief from the wrongdoing of persons unconnected with the defendants' organisation. Further, he argued that, where a business organisation was concerned, the default of an employee in the position of a manager, who was charged with the performance of some part of the employers' statutory duties for them (in this instance the duty to exercise all due diligence), was the default of the employers for the purposes of section 24 (1) (*b*), on the basis, (as paraphrased by Bridge J.):

> " . . . that the manager in effect represents the company and that therefore, *ex hypothesi*, when default on the part of the manager is shown, there must have been a lack of due diligence on the part of the employer."

The Divisional Court was "quite unable to accept" (*per* Bridge J.)[3] the appellant's first contention. While suggesting that there might be "other grounds" for rejecting it, the learned judge contented himself with the argument that the use of the word "person" in section 24 (1) (*a*) related to the words "person under his control" in section 24 (1) (*b*); hence, if section 24 (1) (*a*) were confined to third parties, why refer in section 24 (1) (*b*) to offences committed by any person under his control?

The second contention of the prosecution was based upon the decision of the Divisional Court in *R. C. Hammett Ltd.* v. *L.C.C.*,[4] upholding the conviction of the defendants under the then current weights and measures legislation.[5] They had relied upon a broadly similar third party defence,[6] maintaining that the real offender was a scalesman in their employment, and that they had in force an elaborate managerial system, designed to ensure that their shop managers and assistants complied with the law. The failure to enforce this system upon the scalesman was due to the neglect of his branch manager. Lord Hewart C.J. had held[7] that the defendants were liable for the lack of due diligence shown by the shop manager.

Bridge J. found no difficulty in distinguishing *Hammett's* case from the case before him:

> " . . . the act or default in *Hammett's* case had been on the part of the junior employee, and it was proper to regard the

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[3] [1970] 2 W.L.R. 558, 560.

[4] (1933) 97 J.P. 105.

[5] Sale of Food (Weights and Measures) Act 1926.

[6] s. 12 (5).

[7] (1933) 97 J.P. at p. 110.

> manager as representing the employers in a supervisory capacity. Here the act or default was the act or default of the manager himself . . . it would stultify the defence provided by the statute under section 24 to say that in those circumstances, because the person truly responsible occupied the position of a manager, his employers were to be denied the opportunity of relying on the statutory defence." [8]

As to Bridge J.'s first point, it is likely that the legislature intended the third party defence to protect against default of servants, but the learned judge's interpretation of section 24 appears open to objection. If "control" really governs "person," it can be argued with equal force that defaults of non-employees are excluded from the defence, which would be contrary to authority.[9]

A better argument is that "person under his control" refers, not to "offence," but to "diligence." Paragraphs (*a*) and (*b*) of section 24 (1) are then logically reconcilable: the actual offender from whose actions the employer may dissociate himself may be whomsoever; the conduct which the employer must establish before he may be exculpated will be the conduct of all under his control, that is, within his organisation.

Support for this is found in the current Weights and Measures Act [10]; wording similar to section 24 (1) (*b*) (*i.e.* person under his control) is found both in the third party defence,[11] and in section 26, which gives some protection against mistake or accident only.

There does not seem to be any reason why a shop manager may not be an actual offender, and all senior to him within an organisation the persons through whom the requisite due diligence is exercised. But the decision does leave open the problem of the circumstances in which a court might be prepared to regard a person, of whatever seniority within a management chain, as the directing mind of the company in respect of some particular function, and no longer as another person upon whom personal responsibility may be placed for some contravention.

However, there can be little doubt that a contrary decision in *Beckett's* case would have gone against the present current of opinion evident both in the provisions of public welfare legislation, and its interpretation by the courts. The decisions [12] in which the earlier consumer protection legislation [13] was held to create offences of vicarious liability gave rise to considerable criticism,[14] despite the difficulty of enforcement if traders were not held vicariously responsible for the defaults of their servants. A modified third party defence was first introduced into this legislation in 1926 [15]; this defence, however, excused employers from penalty, and not conviction, and did not abolish their vicarious liability under the statutes. A third party defence that relieved from conviction, and thus modified the principle of vicarious liability, was first introduced into consumer protection legislation in 1955, and is now general.[16]

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[8] [1970] 2 W.L.R. 558, 561.

[9] *e.g.*, *United Dairies Ltd.* v. *Beckenham Corporation* [1961] 1 All E.R. 579.

[10] Weights and Measures Act 1963.

[11] s. 27.

[12] *e.g.*, *Brown* v. *Foot* (1892) 56 J.P. 581; *Coppen* v. *Moore* [1898] 2 Q.B. 306; *Baker* v. *Herd* (1894) 58 J.P. 418.

[13] Food and Drugs Act 1875; Merchandise Marks Act 1887; Weights and Measures Act 1889.

[14] See, Howard, *Strict Responsibility* (1963), pp. 25–26; Glanville Williams, *The Criminal Law* (1961), pp. 255–265; Jerome Hall (1943) 43 Col.L.Rev. 967.

There has been a strong judicial reaction, in recent years, in favour of reasserting the need for *mens rea*—and thus against vicarious liability—in the enforcement of statutory offences generally. As well as in consumer protection, this tendency has been noticeable in (*inter alia*) drug regulation [17] and industrial safety legislation; in the latter this has, on occasion, been so strong as to do violence to the elementary scheme of responsibility under the Factories Act.[18]

In the instance of consumer protection, one cannot help regretting that what is in effect a conflict between private rights and public needs should have arisen. It has been the experience of those enforcing this ever-valuable legislation that nothing so deflects the proper enforcement of the law as the device of shifting the blame for an offence upon some convenient servant. The objection to such a plea was succinctly put in a United States' court: " Such a defence is of a kind that is easy to manufacture to suit the emergency, yet difficult to overthrow. . . ." [19]

Once again this conflict raises doubts as to the efficiency of the criminal law as the proper sanction for the enforcement of public welfare legislation.

R. W. L. HOWELLS.

MORE LORE ON SECTION 14

AMONG the recent crop of cases concerning section 14 of the Sale of Goods Act 1893 the decision of the Court of Appeal in *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*[1] stands out, in that it conflicts with accepted notions in a number of ways.

The court considered the sellers' liability in connection with a contract to supply a food mixture for mink, called " King Size," which the sellers, Christopher Hill Ltd. (henceforth "Hill") compounded in accordance with a formula supplied by the buyers, two companies, who were proprietors of mink farms (henceforth "Ashington"). It was understood between the parties that the buyers, but not the sellers, possessed expert knowledge concerning the breeding of mink. However, the sellers habitually undertook the manufacture to customers' formulae of compounds for animal feeding. Ashington periodically ordered supplies of "King Size," which they in turn marketed to mink farmers in the United Kingdom. No trouble arose for about a year. Then several batches of King Size manufactured by Hill and resold by Ashington contained a certain chemical ("D.M.N.A.") which was found to be toxic to mink, though harmless to other animals, and which caused the death of large numbers of mink. It was found that a consignment of Norwegian herring meal which Hill included in the manufacture of the relevant batches of King Size contained—unknown to any of the parties—the above mentioned substance D.M.N.A., a chemical which at that time was undetected and undetectable.

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[15] Sale of Food (Weights and Measures) Act 1926, s. 12 (5); Merchandise Marks Act 1926, s. 6.

[16] Trade Descriptions Act 1968, s. 24; Weights and Measures Act 1963, s. 27; Food and Drugs Act 1955 s. 113.

[17] *Sweet* v. *Parsley* [1969] 1 All E.R. 347.

[18] *Wright* v. *Ford Motor Co. Ltd.* [1967] 1 Q.B. 230.

[19] *State* v. *Nichols*, 67 West.Va. 659, 661 (1910).

[1] [1969] 3 All E.R. 1496; [1969] 2 Lloyd's Rep. 425 (C.A.).

Correspondence with description

Davies L.J., who read the judgment of the court, took the view that despite the toxicity of the herring meal there was no breach of section 18 of the Sale of Goods Act 1893 since the food mixture corresponded with the description "'King Size', meaning thereby a food compounded in accordance with the agreed formula." Furthermore, it would—in the opinion of the court—have made no difference if the words "mink food" were used as part of the description; for this would mean that the food was *intended* for mink, but not that it was *suitable* for mink. This interpretation of section 18 would seem to deprive the section of any meaning. For on this view literally anything would comply with the description, provided it was "intended" to serve the purpose indicated in its description. A tin of water sold as a "vitamin-fortified milk drink" would correspond to the description of a "beverage intended as a vitamin-fortified milk drink." This is contrary to the well-established view that something described as a "car" must be capable of being used as a car; it does not suffice that it is "intended" as a car.[2] Under section 18 the intention of the parties is relevant only for ascertaining the width of the contractual description.[3] Once it is established, compliance with that description must be judged objectively.

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[2] *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936.

[3] That a reference to a particular purpose may well be part of the contractual description was stated by Diplock, L.J. in *Teheran-Europe Co. Ltd.* v. *Belton (Tractors) Ltd.* ([1968] 2 Q.B. 545, 559; [1968] 2 All E.R. 886, 893). "the description of the goods which is dealt with by s. 18 may well be by reference to the particular purpose for which the buyer requires them."

Fitness for purpose

It was not disputed that the buyers had made known the particular purpose for which they required the compound, namely as food for mink. The question arose, whether they had done this so as to show that they relied on the seller's skill or judgment. Davies L.J. purported to apply a dictum of Lord Wright to the effect that in cases of partial reliance liability under section 14 (1) of the Sale of Goods Act may have to be limited to matters "within the particular province entirely left to the seller's skill and judgment."[4] On this basis the court came to the conclusion that the question of suitability for mink fell outside the province left to seller's judgment, the reason being that as non-experts in the field of mink farming they were "without any means of knowledge" of this unsuitability; the particular purpose did not come within their "sphere of expertise" and they could be relied upon to provide safe and suitable materials only "as far as their skill and experience goes."

Province. In effect the court treated Lord Wright's phrase—wrongly, it is submitted—as if it speaks of the seller's *field of knowledge.* In fact it refers to *aspects of the performance of the contract*; namely such aspects as are not covered by the buyer's instructions, leaving the seller free in this area to exercise his own judgment.[5]

This was recently confirmed in *Vacwell Engineering Co. Ltd.* v. *B.D.H. Chemicals Ltd.*[6] Suppliers of a chemical, who had omitted to attach to its containers a printed warning of an unusual explosion hazard, were held liable under section 14 (1), when an explosion caused serious loss to the buyers. In deciding to use the chemical in their manufacturing process the buyers had exercised their own judgment. They relied, however, on the sellers to warn them of any unusual risk arising from the industrial use of the substance. The duty to research into and warn of its possible dangerous qualities came within the province left to the seller's judgment.

In the case under discussion, it would seem that the buyers relied on their own expertise concerning the contents of the formula and the proportions of its ingredients. But they relied on the seller's reputation as suppliers and compounders of feeding stuffs and on their skill in selecting and acquiring good quality ingredients. As the unsuitability for mink was attributable to selection (*i.e.* change of source of herring meal), and not to the composition of the formula, the defect was a matter within the province left to seller's judgment. Hence liability under section 14 (1) should have followed irrespective of whether the seller could have known of it.

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[4] In *Cammell Laird & Co. Ltd.* v. *Manganese Bronze & Brass Co. Ltd.* [1934] A.C. 402, 428 (H.L.).

[5] That this was what Lord Wright had in mind is clear from further dicta of his in the same case (note 4) which precede those relied upon by Davies L.J. Having stated that reliance need not be total or exclusive, he speaks of a distinction to be drawn "between such part of the maker's obligation as is merely to follow precisely what is specified, and such part of his obligation as involves in its discharge the exercise of his skill and experience" ([1934] A.C. at p. 427). (Accordingly, in that case, such aspects of the manufacture of two ship propellers, as were not covered by buyer's instructions, came within the "seller's province.")

[6] [1969] 3 W.L.R. 927; [1969] 3 All E.R. 1681; discussed in (1970) 33 M.L.R. 446. An appeal in this case has since been settled: *The Times*, May 11, 1970.

Reliance. The seller's lack of expert knowledge may exclude liability under section 14 (1) if—contrasted with the buyer's expertise in the relevant field—it indicates that the parties cannot have intended reliance on the seller's judgment. The greater the discrepancy between the parties in this respect, the more likely that it will be regarded as evidence of non-reliance.[7] This approach however, was not appropriate in the present case. Davies L.J. having accepted it as a case of reliance (albeit partial reliance), had already answered the question which he then asked by considering whether the seller's lack of experience in the field of mink farming indicated non-reliance on seller's judgment concerning suitability for mink.

Fault. It is generally accepted that liability under section 14 (1) is strict in the sense that it is not affected by the absence of fault or negligence.[8] This was confirmed in *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Ass.*,[9] the facts of which resemble those in the present case, in that there, too, loss was caused by feeding stuffs, which—unknown to the parties—were poisonous to the animals (namely pheasants) to which they were fed. In the course of discussing the seller's assurance of fitness for the buyer's purpose under section 14 (1), Lord Reid states that this "covers not only defects which the seller ought to have detected but also defects which are latent in the sense that even the utmost skill and judgment on the part of the seller would not have detected them."[10]

It would seem that by making the seller's liability under section 14 (1) depend on his ability to know of the defect,

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[7] In *Teheran-Europe Co.* v. *S. T. Belton (Tractors) Ltd.* (note 3) the buyers, but not the sellers, of air compressors intended for resale in Persia, knew of the peculiarities of the Persian market. Hence it was held that the buyers had shown no reliance on the sellers' judgment concerning saleability in Persia. However, this result need not necessarily follow. Thus the mere fact that the buyer's expertise equals that of the seller does not necessarily show non-reliance and "the contrary may well be the case" (*per* Lord Morris of Borth-y-Gest in *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Ass.* (note 9), where both parties were members of the same relevant trade association).

[8] *Frost* v. *Aylesbury Dairy Co. Ltd.* [1905] 1 K.B. 608 (C.A.); *White* v. *John Warwick & Co.* [1953] 1 W.L.R. 1285 (C.A.).

[9] [1969] 2 A.C. 31; [1968] 2 All E.R. 444 (H.L.). The major difference between that case and the one under discussion was that there was in the earlier case a straightforward sale of "Brazilian ground nut extractions," as opposed to one of a compound manufactured to customers' formula.

[10] [1969] 2 A.C. at p. 84; [1968] 2 All E.R. at p. 457.

Davies L.J. was importing notions of "fault" or "knowledge" into an area which has hitherto been regarded as one of strict liability.[11]

Merchantable quality

Though unmerchantability of the goods was conceded, section 14 (2) nonetheless did not avail the buyer; the goods were held not to have been bought "from a seller who deals in goods of that description." The reason was that Hill, though dealers in animal feeding stuffs, had never previously sold "King Size" or "mink food." Section 14 (2) was interpreted as if it required dealings in goods of a description identically the same as the contractual description, whereas it has always been assumed that the phrase refers to goods of the same general description, *i.e.* that it stands for goods "of this kind," "of this category."[12] The court arrived at this unorthodox interpretation by starting from the proposition that the term "description" in section 14 (2) must mean the same as in section 13. This, however, is correct only as far as the *meaning of the phrase* goes (*i.e.* "sale by description," and "goods bought by description," in section 13 and section 14 (2) respectively, refers in each case to the fact that goods are bought as corresponding to a description rather than as a specific thing). But the court went beyond this and implied that the *width* or *contents of the description* must be the same in each section. This—it is submitted—is at variance with the accepted view that, whereas the contractual description for the purposes of section 13 is as precise and detailed as the parties care to make it, "description" in section 14 (2) has a more objective and general meaning.[13] However, the court was no doubt correct in assuming that within section 14 (2) the width of the description is the same both for the purposes of the introductory phrase: "where goods are bought by description " and for the purposes of the phrase, which refers back to it: " who deals in goods of *that* description " (italics added).

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[11] Incidentally, a similar approach appears to have been adopted by Rees J. in *Vacwell Engineering Co. Ltd.* v. *B.D.H. Chemicals Ltd.* ([1969] 3 All E.R. 1681; [1969] 3 W.L.R. 927). when, in the course of discussing s. 14 (1), he inquires whether the sellers knew or could reasonably have foreseen that the chemical in question might cause an explosion when used in the buyer's manufacturing process. However, the learned judge concludes his considerations by expressly reaffirming that "in this context, it matters not that [the sellers] did not know of the explosion hazard at the relevant time."

[12] *Cf. Spencer Trading Co. Ltd.* v. *Devon* [1947] 1 All E.R. 284. Also instructive here is para. 448 of the Report of the Molony Committee (Cmnd. 1781, 1962). The Committee criticised the requirement as narrowing down the scope of s. 14 (2) so that the seller will be liable only where he deals in goods "of the type sold" if he has traded in "the same line" or in "similar goods." This meaning of the phrase is confirmed in the Law Commissions' Report on Exemption Clauses of July 1969. The Commissions simply assumed, without more, that "of that description" as presently contained in s. 14 (2), means "of the type" sold. See their recommendation, considered in paras. 31 and 46, that the conditions implied under s. 14 (1) and (2) should in future be imposed whenever the seller sells the goods in the course of a business, irrespective of whether he is habitually dealing in goods *of the type* sold (italics added).

[13] See note 12 above.

Recent dicta by Lord Reid[14] might have suggested that " description " in section 14 (2) has a less general meaning than the one it was usually thought to have. His lordship, advising the the buyer that he ought " to have insisted that a more specific description must be inserted in the contract," apparently envisaged that the parties could choose a description as precise as they wished so as to affect the question of merchantability. However, in a more recent case, *Brown (B. S.) & Sons Ltd.* v. *Craiks Ltd.*,[15] Lord Reid had an opportunity to remark on this particular point. In that case cloth, to be manufactured to buyers' specifications, though complying with the contractual description and suitable for industrial purposes, was not suitable for making dresses, for which—unknown to the sellers—the buyers required it. The House of Lords held that nonetheless the goods were of merchantable quality; though cloth of that precise description had never before been sold for industrial purposes, cloth of the same " general character and designation " was ordinarily so used. In this context Lord Reid stated:

> " There is, I think, some ambiguity in saying that goods are of the same description where the contract description is a precise and detailed specification for their manufacture. One may mean of the *same precise and detailed description*, and that may be novel; or one may mean of the *same general description*, and that may be common. In most of the authorities the latter meaning seems to have been adopted " (italics added).

Thus, in the light of both older and more recent authorities there should have been no doubt that the sellers in *Christopher Hill Ltd.* v. *Ashington Piggeries Ltd.*, as compounders and suppliers of animal foodstuffs, did deal in goods of " that description," even assuming that the contractual description, as Davies L.J. suggested, at this stage " could not extend beyond mink food."[16]

INGRID PATIENT.

CONSTITUTIONAL PROTECTION FROM RACIAL DISCRIMINATION IN SIERRA LEONE

THE recent decision of the Judicial Committee of the Privy Council in *Akar* v. *Att.-Gen. of Sierra Leone*[1] is a sad commentary on a botched-up attempt at racial discrimination by the Parliament of Sierra Leone. The appellant Akar, an entertainment entrepreneur, was born on May 20, 1927, in the former Protectorate of Sierra Leone of a Lebanese father and an indigenous Sierra Leone mother. In accordance with the terms of section 1 (1) of the Sierra Leone Constitution, he became a citizen of Sierra Leone on April 27, 1961, for that section provided that every person who was born in the former Colony or Protectorate [2] of Sierra Leone automatically became a citizen of Sierra Leone on April 27, 1961, if he was a citizen of the United Kingdom and Colonies or a British-protected person [3] on April 26, 1961, and one of his parents or any of his grandparents were born in the former Colony or Protectorate of Sierra Leone.

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[14] In *Hardwick Game Farm* v. *Suffolk Agricultural Poultry Producers Ass.* [1969] 2 A.C. 31, 77; [1968] 2 All E.R. 444, 452.

[15] [1970] 1 W.L.R. 752; [1970] 1 All E.R. 823.

[16] I am much indebted to Professor A. L. Diamond for his criticisms and comments which have helped me considerably.

[1] [1969] 3 W.L.R. 970.

In 1962 certain amendments to the Constitution were effected by the Constitution (Amendment) (No. 2) Act 1962, which was Act No. 12 of 1962. First, the words " of negro African descent " were inserted after the words " every person " in section 1 (1) of the Constitution and secondly this amendment was deemed to have come into operation on April 27, 1961, even though Act 12 of 1962 was passed in the House of Representatives only on January 17, 1962, and received the Royal Assent on March 17, 1962. The effect of this purported retroactive amendment was to deprive, by a deeming process, any person who was not of " negro African descent " of the citizenship of Sierra Leone which he automatically acquired on April 27, 1961, on the very day that he acquired that citizenship. The appellant was not a person of negro African descent as neither his father nor his father's father could be described as negroes of African origin. He was therefore purportedly deprived of his citizenship even though he was clearly a citizen of Sierra Leone from April 27, 1961, till March 17, 1962, which was the date on which Act 12 of 1962 received the Royal Assent.

Not unnaturally, the appellant regarded this purported deprivation of his Sierra Leone citizenship as based solely on racial grounds. He therefore challenged the validity of Act 12 of 1962 and claimed that this Act was *ultra vires* the fundamental rights provisions of the Constitution of Sierra Leone. Chapter II of the Sierra Leone Constitution, which contains the fundamental rights provisions, begins with a declaration that every person in Sierra Leone is entitled to protection " from discrimination on the grounds of race or of similar grounds." [4] But it is really section 23 of the Constitution which gives protection from discrimination on grounds of race by providing that no law shall make any provision which is discriminatory either of itself or in its effect. Like most fundamental rights provisions, however, this protection is subject to certain exceptions and the Attorney-General relied on the exception which allowed the Parliament of Sierra Leone to subject persons to certain disabilities or disadvantages which, having regard to their nature and to special circumstances pertaining to those persons or to persons of any other such description, are reasonably justifiable in a democratic society.[5]

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[2] The former Colony and the former Protectorate of Sierra Leone together became part of Her Majesty's Dominions under the name of Sierra Leone on April 27, 1961.

[3] The appellant was on April 26, 1961, a British-protected person.

[4] Constitution of Sierra Leone, s. 11.

When the matter came before the Supreme Court of Sierra Leone, the Chief Justice decided in favour of Akar and held the purported amendments of the Constitution were *ultra vires* the Constitution and therefore void. The Court of Appeal of Sierra Leone, however, took a different view and reversed the decision of the Chief Justice. Akar then appealed to the Privy Council.

The Privy Council by a majority[6] (Lord Guest dissenting) restored the judgment of the Chief Justice. Their lordships doubted whether it could be said that to impose a disability on the ground that someone's father and paternal grandfather were not "negroes of African descent" was something which having regard to its *nature* was reasonably justifiable in a democratic society. In addition, their lordships indicated that they could find no trace of any *special circumstances* pertaining to the appellant or those similarly placed to him which made the legislation reasonably justifiable in a democratic society. They were quite emphatic that the special circumstances would have to be additional to the differences of race for, as their lordships put it:

> "If section 23 provides that no law shall make any provision which treats some people differently from others merely because of differences in race it cannot be that such differences in race would alone constitute 'special circumstances' pertaining to those being treated differently."[7]

As the exception relied on by the Attorney-General did not apply, the attempt by the Parliament to discriminate on racial grounds was held to be *ultra vires* the Constitution and void. Act 12 of 1962 was held by their lordships "to offend against the letter of the Constitution and to flout the spirit of the Constitution."[8]

The Attorney-General relied on another ground which was also rejected by the Privy Council. The Parliament of Sierra Leone had by Act No. 39 of 1962 attempted to amend section 23 of the Sierra Leone Constitution in a way which would give it power to limit "citizenship of Sierra Leone to persons of negro African descent *as defined in subsection (3) of section 1 of this Constitution*." As section 23 was one of the entrenched clauses of the

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[5] Constitution of Sierra Leone, s. 23 (4) (*f*).

[6] The Judicial Committee of the Privy Council consisted on this occasion of Lord Morris of Borth-y-Gest, Lord Hodson, Lord Guest, Lord Wilberforce and Sir Gordon Willmer.

[7] [1969] 3 W.L.R. 970, 976.

[8] *Ibid.* at p. 977.

Constitution a special procedure [9] was required for its amendment and that special procedure was followed by the Sierra Leone Parliament. The Parliament, however, made the fatal error of referring in Act No. 89 to "*subsection (3) of section 1 of the Constitution.*" This subsection would only have come into existence if Act 12 of 1962 had been valid. It was clear therefore that Act 89 needed as a basis an assumption that Act 12 was valid and so an existing Act. The Privy Council, however, had declared Act 12 of 1962 to be invalid. The invalidity of Act No. 89 followed as a result. The contention that Act No. 89 should be regarded as impliedly reviving or re-enacting any invalid provisions of Act 12 was rejected by their lordships because the "provisions of section 2 of Act 12 were invalid when the Act was passed and assented to and the provisions must be treated as having been non-existent. There is no provision in Act No. 89 which purports or sets out to give them life."

The appellant is at the time of writing a citizen of Sierra Leone. The fact that he is still a citizen should not, however, be regarded as a great triumph for fundamental rights provisions in the Constitutions of the British Commonwealth. It seems reasonable to assume that if the Parliament of Sierra Leone had proceeded in a different manner it could have effectively deprived the appellant of his citizenship even on racial grounds. Thus, if the Parliament had first amended section 23 of the Constitution by making section 23 (1) inapplicable to any law in so far as that law makes provision "for the limitation of citizenship of Sierra Leone to persons of negro African descent," there seems little doubt that the Privy Council would have held Act 12 of 1962 valid even though its effect was to discriminate on racial grounds. Their lordships were careful to point out that the Parliament in Sierra Leone was given the plenitude of power to make laws for the peace, order and good government [10] of Sierra Leone and also the power to *alter* [11] the provisions of the Constitution. The Chief Justice in finding in favour of the appellant had expressed the view that the legislature could not alter the Constitution except to improve it and the enactment of racially discriminatory legislation was no improvement. The Privy Council (while also finding in favour of the appellant) specifically rejected this view in the following words:

> "A view-point (which found favour with the Chief Justice) that it was not open to the legislature to make any alteration (whatever its form) to the Constitution which did not amount

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[9] The special procedure is set out in s. 43 of the Constitution of Sierra Leone. Basically it means that a Bill to amend s. 23 has to be passed by a two-thirds majority of all the members of the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions. S. 23 is entrenched.

[10] Constitution of Sierra Leone, s. 42.

[11] *Ibid.*, s. 43.

to an improvement of the existing law was not advanced before their lordships and would not have been acceptable." [12]

One does not have to be a cynic to expect that persons in the position of the appellant will soon be deprived of their citizenship in Sierra Leone by the Parliament of Sierra Leone. What good then will the elaborately drawn-up fundamental rights provisions of the Sierra Leone Constitution have served? Could it be said that the draughtsmen of that Imperial enactment have wasted their time? The answer to these questions is not an easy one. The publicity and the trouble which this attempt at racial discrimination has engendered may serve to curtail further inroads upon the fundamental rights and freedoms of the citizens of Sierra Leone. In the last analysis, however, a large majority in Parliament can effectively emasculate the fundamental rights provisions of the type found in the Constitution of Sierra Leone. There does not appear to be a sure way of preventing this happening, but the approach of the Supreme Court of India in *Golak Nath* v. *State of Punjab* [13]—that the Parliament cannot abridge or take away any of the fundamental rights in Part III of the Constitution and that a special Constituent Assembly must be set up for making a new Constitution if an amendment of the fundamental rights provisions of the Indian Constitution is sought by the legislature—appears at the moment to be the most effective safeguard against the whittling away, by legislatures, of the fundamental rights provisions which are found in many of the Constitutions of the British Commonwealth.

F. A. TRINDADE.

PRIVILEGE OF CHILD CARE CASE RECORDS

IN *Re D. (Infants)*,[1] a county council was resisting an application by the mother of children in care (who had been made wards of court) to have them returned to her. The child care officers of the council were witnesses in the case and no objection on grounds of privilege to their examination in chief or cross-examination appears to have been taken by the county council. But when counsel for the mother asked for disclosure of the reports of the child care officers, the council objected, and its claim of privilege was upheld by the Court of Appeal.

The case records were kept in terms of the Boarding-Out of Children Regulations 1955, under section 14 of the Childrens Act 1948. No provision is made in the Act for the secrecy of the records, and regulation 10 (8) says only that they "shall be open to inspection at all reasonable times by any person duly authorised in that behalf by the Secretary of State." Presumably the mother had not made application to the Secretary of State, but reference to "any person" does not prima facie include a court, nor did the Court of Appeal in *Re D.* so hold. The mere fact that records are kept under a statutory duty does not seem previously to have been recognised as a ground of privilege in the absence of an express statutory provision,[2] such as appears, for example, in regulation 7 of the Adoption Agencies Regulations 1959.

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[12] [1969] 3 W.L.R. 970, 981.

[13] A.I.R. 1967, S.C. 1643. By a majority of six to five. There is a good discussion of this case in [1967] *Annual Survey of Commonwealth Law* at pp. 40 *et seq.*

[1] [1970] 1 W.L.R. 599 (C.A.).

Is there then any privilege at common law, either private or public?

Lord Denning's comment[3] that the child care officers could not be compelled to produce their reports "any more than legal advisers are compelled to produce their notes" seems to contemplate a private privilege in the witnesses or in the county council. But the analogy with legal advisers is not a good one. The solicitor-client privilege is one which has not been extended to other confidential professional relationships,[4] and child care officers are not in the position of solicitors. Their records were compiled partly in compliance with a statutory duty and partly, no doubt, for the convenience of themselves and the county council employing them, whereas it is only if the reports had been made for the purposes of litigation that the solicitor-client privilege could apply. There is no privilege for the reports of agents to their principal if not prepared for submission to the principal's legal adviser.[5] In any event, the extent of the solicitor-client privilege itself is extremely curtailed in wardship cases, as can be seen from *Ramsbotham* v. *Senior*.[6] Nor could the reports be treated as equivalent to "without prejudice" statements, as in that case they would have to have been made in the course of negotiations with the mother and would have been disclosed to her, but not to the court. Finally, the rule that a party need not produce documents relating only to his own case and in no way tending to impeach or support the case of any opposing party, has been abolished by section 16 (2) of the Civil Evidence Act 1968.

Could the reports of the child care officers be privileged under the overhaul of the Crown privilege doctrine effected by the House of Lords in *Conway* v. *Rimmer*[7]? Evaluations of parents and foster-parents of children in care are very different from matters of national security, high-level policy making, Cabinet minutes, and so forth, to which Crown privilege is properly conceived of as being appropriate. The question whether Crown privilege can ever arise where the central government is not involved (and in *Re D.* the claim of privilege was made not by the appropriate Minister of State but by the county council itself) does not appear to have been adverted to in *Re D.*, although in *Blackpool Corporation* v. *Locker* [8] interdepartmental correspondence of a municipal corporation was held not to be privileged. It was stressed in *Conway* v. *Rimmer* [9] that the simple fact of documents being official or private or confidential does not necessarily mean that disclosure can be withheld. All the judges in *Re D.* thought that the candour of child care records might well be inhibited if reports were to be subject to the possibility of disclosure in court, but in *Conway* v. *Rimmer* the House of Lords took the view that the possibility of disclosure was more likely to encourage than to inhibit responsible official candour.[10] Even the procedure approved in *Conway* v. *Rimmer*—that documents may be inspected privately by the court to see whether a claim of privilege is well-founded—was not followed in *Re D.*: Lord Justice Harman commented [11] that the child care reports should not be produced even to the judge, let alone to the other party. (This view incidentally implies disapproval of the *Practice Direction* on the point issued by the Chancery Division.[12])

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[2] *Lee* v. *Birrell* (1818) 8 Camp. 887; *Fowler* v. *Fowler and Sine* [1968] P. 811 (C.A.) esp. at pp. 817–818.

[3] [1970] 1 W.L.R. 599, 600.

[4] Sixteenth Report of the Law Reform Committee, December 1967, Cmnd. 8472.

[5] *Skinner* v. *Great Northern Railway Co.* (1874) L.R. 9 Ex. 298; *Birmingham & Midland Motor Omnibus Co.* v. *London & North-West Railway* [1918] 3 K.B. 850.

[6] (1869) L.R. 8 Eq. 575.

[7] [1968] A.C. 910 (H.L.).

It is very far from obvious that the court itself should not see such reports especially when, as in wardship cases, it is being asked to exercise the prerogative as *parens patriae*. Indeed, it could be argued that the courts ought to insist on being afforded such assistance as can be obtained from that source. And if this is so, can the parties—or still less, only one of them—be deprived of the opportunity of persuading the court against any finding there contained? In *Re K. (Infants)*,[13] the House of Lords held that the report to the court of the Official Solicitor acting as guardian *ad litem* to the infant in wardship cases may be withheld from the parties if the judge, in his discretion, feels this is essential. Lord Jenkins left open [14] but Lord Devlin seems to have approved [15] the correctness of the view of the Court of Appeal that no similar discretion to withhold arises where the Official Solicitor is not a party. The Court of Appeal in *Re D.* could perhaps have disregarded this part of its own judgment in *Re K.*[16] and its approval by Lord Devlin, and could have extended the *Re K.* discretion to cover reports of child care officers.[17] But it did not do so. Lord Denning said [18] *Re K.* had no bearing on the case before the court because " it is not the judge who wants these case notes. It is counsel for the mother." This distinction is with respect a dubious one, since a party is entitled to compel evidence which is not privileged and the court is obliged first to assist him in obtaining its production and thereafter to consider it judicially. Even in the jurisdiction *parens patriae* departures from this principle require not mere convenience but absolute necessity,[19] especially where what is withheld from the parent is an allegation against him.[20] If there is a public interest in protecting the infant in wardship cases from the disclosure of reports on the parents, surely there is also a public interest in the court acting in wardship cases on information as full, and as fully tested, as possible. In *Re D.* an opportunity was missed to set *Re K.* in the general context of the law of privilege as enunciated in *Conway* v. *Rimmer.*

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[8] [1948] 1 K.B. 849, 879–880 (C.A.).

[9] [1968] A.C. 910, esp. at pp. 957, 981. And see Evershed L.J. in *Blackpool Corporation* v. *Locker* [1948] 1 K.B., 849, 885 (C.A.): ". . . the defendant, as proprietor of the premises sought to be seized, could in no fair sense of of the word be regarded as a member of the public when his solicitor raised the question of disclosure . . . ."

[10] At pp. 957, 988–989, 994.

[11] [1970] 1 W.L.R. 599, 601.

[12] [1968] 1 All E.R. 762; [1968] 1 W.L.R. 378.

[13] [1965] A.C. 201 (H.L.).

[14] At pp. 228–239.

[15] At p. 237.

All the judges in *Re D.* laid great stress on the fact that it was not the practice to order discovery in custody or wardship proceedings. If child care records are not to be assimilated to the report of the Official Solicitor, should not consideration have been given to whether this practice is consistent with *Re K.* as well as whether it has survived *Conway* v. *Rimmer* unmodified ?

JEAN CAMPBELL.

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[16] The Court of Appeal followed its *Re K.* decision in *Fowler* v. *Fowler and Sine* [1963] P. 311 (C.A.).

[17] This seems to be the effect of the Chancery Division *Practice Direction*, note 12 above.

[18] [1970] 1 W.L.R. 599, 600.

[19] *Scott* v. *Scott* [1913] A.C. 417 (H.L.), 437–438.

[20] *Re K.* (*Infants*) [1965] A.C. 201 (H.L.), 241–242.

REVIEWS

CRIME, LAW AND THE SCHOLARS: A HISTORY OF SCHOLARSHIP IN AMERICAN CRIMINAL LAW. By GERHARD O. W. MUELLER. [London: Heinemann. 1969. xvi and 302 pp. (with index). 70s. net.]

PROFESSOR RADZINOWICZ has chosen to make this work Volume XXVI in the Cambridge Studies in Criminology, at first sight rather a puzzling decision, since it is quite narrowly concerned with the history of thought in relation to criminal law rather than to criminology in the U.S.A., and therefore might appear to be of little concern to, or interest for, English lawyers and criminologists. But it would be a mistake to be put off reading it for that reason, and I at any rate found it quite fascinating. The author, who is a professor in the New York University, has written his book with his eye on "the lesson for the future" as much as on the presentation of a history of events.

The volume traces indeed the development of a highly sophisticated criminal law, perhaps the most highly developed in the world, from its typically narrow and opportunistic common law origin among the early colonists. Hale and Hawkins seem not unnaturally to have had little significance to these settlers in a new land but by the period of the intellectual and emotional stirrings which eventually led to the War of Independence a very different climate had developed: Blackstone caused a stir in the American colonies which seems in retrospect out of all proportion to the quality of his Commentaries, high as this was. Real scholarship in Anglo-Saxon America may be said to begin with George Wythe in Williamsburg where he became professor at the College of William and Mary—Thomas Jefferson was his pupil and his office, furnished in eighteenth-century style, may be visited today by the curious tourist in colonial Williamsburg.

The struggle for independence seems indeed to have acted as a catalyst to the American intellect and by the early nineteenth century legal scholarship in the new sovereign state was catching up with that in the old country; soon, at any rate in criminal law, to draw level and even to go ahead. For the mid-century Francis W. Wharton could be regarded as a descriptive writer on the criminal law as of much the same calibre as Russell, and as a jurisprudential writer Joel Bishop could be considered as having as deep an insight as Stephen.

When in his third chapter Professor Mueller reaches what he calls "the mainstream of development" he is hard put to it to keep up with all the claimants to recognition. No doubt most of the writers on criminal law of this period were of somewhat pedestrian quality, but at least two academic stars of the first magnitude, in Beale and Wigmore, devoted much of their attention to criminal law. The latter, who was one of the founders of the well-known *Journal of Criminal Law, Criminology and Police Science*, had much to do with the widening of horizons which for long was so much more evident in the U.S.A. than in England.

But criminology, in Anglo-Saxon countries at any rate, owes more to medical men than to lawyers, and long before Wigmore's time such men as Rush and Ray had made their impact on penal thought. The latter's influence on Charles Doe, for long Chief Justice of New Hampshire, led to the enlightened rule established in that state on the subject of mental disease and criminal responsibility. In this important chapter, entitled "Criminology takes the Lead," Professor Mueller brings us down to such well-known names as Glueck, Ploscowe, and Thorsten Sellin. In this chapter, too, he has much to say about—and to criticise—the favourite American pastimes of code making and surveys.

Meanwhile in the period between the wars the criminal lawyers as such got a little lost. Sociological thinking was influencing some of the best of them, such as Jerome Hall, as well as the criminologists, and while much fruitful work was produced, it gave the impression of groping. Professor Mueller emphasises the importance of the influence of the European scholars who found refuge in the U.S.A. from the Nazi oppression, of whom von Hentig was perhaps the best known. He calls them the "catalysers," and they certainly seem to have awakened a new interest in the theory of criminal law. During the same period much interdisciplinary scholarship becomes evident; it had the result of fertilising the theory. With Jerome Hall it led to a wider interest in philosophic and jurisprudential thinking and eventually may be said to have re-established the position of straight legal scholarship. With his important *General Principles of Criminal Law* (1947), a book which has of course had much influence in England, Jerome Hall re-established securely the claims of legal scholarship to recognition, and this seemed to Professor Mueller a fitting point to break off his narrative.

CHORLEY.

WHAT'S WRONG WITH THE LAW? Edited by MICHAEL ZANDER. [London: B.B.C. 1970. ix and 126 pp. 21s.]

EVEN the most conservative of lawyers could in these days of vigorous reform manage to fill 126 pages with his criticisms of the law. But even within this brief compass there is much which is new and which will interest the lawyer. *What's Wrong With The Law?* is an edited version of a series of Third Programme talks broadcast under that title in 1969. While the enforced brevity inevitably has its effect, it does have the advantage that even the busy practitioner (and academic) who missed the original broadcasts or the reprints in *The Listener* will be able to take up this volume at odd moments, and it is to be hoped that he will.

It is unlike, say, *Law Reform NOW*, which was a far more substantial work dealing separately with each department of the law, or particular studies like Michael Zander's on the legal profession. It takes a much broader view of the system as a whole and often does so with great perception.

Michael Zander in his Introduction answers the question posed in the title in few words: the law "is too complicated and remote, too slow and too expensive" (p. 1). This is the theme developed by the eight contributors, whose talks inevitably vary in quality. It is on an exciting note that Mr. Zander ends. "I believe," he writes, "that historians in a hundred years' time may describe a great era of legal reform starting in the mid-1960s, gathering momentum in the early 1970s and flowering in the last quarter of this century" (p. 7).

Mr. Justice Scarman asks: "Need the Law Be Obscure?" His answer: "No." And "Is it?"—"Yes." Complexity, he points out, need not involve obscurity. Something must be wrong if, as Dr. E. J. Cohn has said, a point which would take a German lawyer twenty minutes to research takes an English lawyer hours. "The statutes," says Sir Leslie, "are elaborate to the point of complexity; detailed to the point of unintelligibility: yet strangely uninformative on matters of principle" (p. 10). And the recent report of the Statute Law Society, *Statute Law Deficiencies*, confirms every word. It is almost a century since Dicey drew attention to "this evil" (see *The Law of the Constitution* (10th ed., 1959), ed. Wade, p. 52), since when the problem has steadily grown worse.

Anthony Lester discusses whether there is equality before the law, even though lawyers on the whole gave up considering this years ago. Refinement of the legal aid scheme here and there, they say, will solve everything. But coming from the barrister who was one of the moving spirits behind the Race Relations Acts, they are views which command respect. One grave deficiency cited by Mr. Lester is the absence of legal aid before most administrative tribunals, although this is slowly being remedied. This is the sort of work which law students could do well: they do it in the United States and, nearer home, in Belfast, and the Child Poverty Action Group's new Citizens' Rights Office plans to make a start here shortly. It is difficult to say whether the citizen or the student will benefit more! And perhaps eventually welfare or community law will exist as a coherent, self-contained legal subject, as it does in the United States which has no welfare state.

At a less tangible level Mr. Lester argues that the traditional neutrality of the common law must be modified. Only a gigantic fiction serves to suggest that an individual buying a car from an oligopolistic manufacturer is bargaining a private treaty on equal terms. And the same can be said, for example, in the case of insurance, mortgages, guarantees and exclusion clauses: ". . . there will be no genuine equality before the law unless our legal services discriminate positively in favour of the weak," concludes Mr. Lester (p. 25). Or as William Blake put it: "One law for the Lion and Ox is oppression." Or indeed as was said of another age by Anatole France: "The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread."

Mr. Commissioner Marsh, Q.C., deals with the law's rigidity, and doubts whether at present the necessary degrees of certainty and flexibility are well balanced. There is much to commend his suggestion of prospective overruling, but judicial resistance to a change which would deny the declaratory effect of the judicial process would be immense.

"Does the Law Adequately Protect the Individual Against the State?" is a vast subject, which Mr. Warren Evans, a barrister, could scarcely tackle in so short a span. He makes no mention of significant recent judicial developments like *Conway* v. *Rimmer* [1968] A.C. 910 and *Padfield* v. *Minister of Agriculture* [1968] A.C. 997. Nor does he discuss whether a new Administrative Division of the High Court is necessary. But his demand for a general code of administrative procedure, as in the U.S.A., is a *sine qua non* for a strong and effective administrative law, and is called for too infrequently.[1]

Morris Finer, Q.C., looks at the legal profession with a critical and compassionate eye in a contribution particularly notable for its elegance of style. Professor Street, of course, is anxious to dispatch over three-quarters of the present work of the Queen's Bench Division—the personal injuries cases—away from the courts altogether (see Elliott and Street, *Road Accidents*, 1968, reviewed at (1969) 32 M.L.R. 580, and McKenna J. (1969) 32 M.L.R. 601, 611–612). The contrast with the industrial injuries system is indeed cogent.

Andrew Watson, M.D., holds the positions of Professor of Psychiatry in the Medical School and Professor of Law in the Law School of the University of Michigan. He asks: "Could the Legal System Be More Humane?" Because of their training and the structure of the profession, the vast majority of lawyers, observes Dr. Watson mildly, lack any "common-sense awareness of their clients' emotions. . . . Lawyers are taught and urged to distrust and to eliminate emotions from their work. As if this were possible! They might as well attempt to fly with their hands!" (p. 68). Should a psychiatrist ever teach law in an English law faculty, then Dr. Watson's criticisms may begin to be inapposite.

According to Lord Devlin, the main source of injustice is "non-litigation," which has two causes: "first, the incompleteness and obscurity of the law that prevents or deters action, and secondly the appalling cost." "The two together," he continues, "have turned litigation, which ought to be a gentle solvent of disputes, into a thing of horror" (p. 74). But when was litigation ever anything but a disaster for all but the lawyers? It remains a continuing scandal that disputes involving sums of less than £30 are too small to justify litigation. Lord Devlin launches a frontal attack on the two fundamental aspects of the English system which in his view lead to the appalling cost—the adversary nature of the proceedings and the insistence on oral evidence (and on this latter point he has Sir Brian McKenna's support, *loc. cit.* at p. 607). With Lord Devlin chairing the JUSTICE committee on civil procedure, some interesting recommendations may be anticipated. But how many lawyers reared in the notion that the common law's aim was perfect justice will subscribe to Lord Devlin's revolutionary thesis that "if by slightly increasing the percentage of error, we can substantially reduce the percentage of cost" (p. 76), that is what should be done?

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[1] See, however, Professor Whitmore's University of London Public Lecture on Laws, published in this issue of the *Modern Law Review*.

There then follows a discussion among Mr. Zander, Lord Devlin, Mr. Lester and Sir Leslie Scarman, in which the need for a Ministry (or "Department") of Justice unanswerably emerges and an interesting exchange takes place between Mr. Lester and Lord Devlin on the proper role of the judge in the judicial process, with Lord Devlin unfortunately and probably unintentionally remarking that "My idea of a healthy judiciary is a judiciary that is not concerned with where the law leads to" (p. 91). It would be shameful if decisions which as so often happens could be made either way on the law were decided with no thought at all as to the consequences. Which is not necessarily to say that judges should have a creative role—a view Lord Devlin rejects so strenuously.

The volume closes with an inquiry into legal education which surveys the many faults to be found both in the universities and in the professional courses, but nothing very useful emerges. This cannot be because there is any shortage of possibilities.

The literature on law reform is growing. This in itself is a welcome sign, and this volume in particular is a useful addition.

GRAHAM ZELLICK.

TANGLING WITH LAW: REFORMS IN LEGAL PROCESS. By F. A. R. BENNION. [London: Chatto & Windus. 1970. vii and 158 pp. (with index). Hardback, 30s. net; paperback, 15s. net.]

MR. BENNION in a small book moves over a wide area and in addition to casting a cool eye on present imperfections he provides quite an amount of information. How many people know that Mr. Justice Stephen used to punish unseemly laughter in his court by making the offender stand by the prisoner in the dock until the end of the case? One wonders whether the dock would always be capacious enough if the conventional muffled titter disturbed a crowded court. He also relates that when wigs were first worn by young barristers judges condemned them as "coxcombical" and that as late as 1713 judicial wigs were not invariably worn—he writes that the statue of Sir John Powel (a Queen's Bench judge who died in 1713) in Gloucester Cathedral shows him in skull cap but no wig.

In a discussion of the practice of the police in questioning those suspected of crime he raises some queries which might profitably be considered by proponents of a restriction on the traditional right of the British freeman to preserve silence when interrogated. He recalls that at the Commonwealth Law Conference in 1965 the Director of Public Prosecutions suggested that a person being questioned, at any rate until he is charged, should be obliged to reply to questions put by the police. Mr. Bennion asserts that the nature of the proposed obligation is obscure since it was not proposed that failure to answer should be a criminal offence. No doubt failure could be commented on at the trial but it is questionable whether that would be of great utility in practice. Then there are commentators who think that the Judges' Rules should be abolished. Lord MacDermott, Lord Chief Justice of Northern Ireland, has argued that the courts should determine, as a matter of law, whether evidence offered is admissible and, as a matter of discretion, whether it should be excluded in the interests of a fair trial. The difficulty is that the police would have to be given some guidance about permissible modes of questioning, and it is proper to recall that the original Rules were formulated because of differing judicial approaches to the same problem. Mr. Bennion is surely right in his assertion that if instructions have to be given it is preferable that they be given by judges rather than the executive. "Certainly," he writes, "nothing must be done to encourage the police to think that they can use any means to extract evidence." He adds that there have been several recent inquiries which have established brutality by police seeking evidence, and he mentions the notorious affair at Sheffield in 1963 when police officers were found by a tribunal to have inflicted serious injuries on persons in custody. According to Mr. Bennion, "one police officer is on record as saying that any of his colleagues who did not know the Judges' Rules would be a fool, but he would be even more of a fool if he adhered to them." In one respect in which there can be a check, that is, the duty to record the times of the beginning and ending of questioning and of statements, failure to follow the Rules occurs not uncommonly. Clearly, it was the intention of the judges who framed the new Rules that these matters should be recorded. The times can be of importance where it is alleged that the questioning has been oppressive and protracted or that the written statement has been the subject of prompting or impropriety by police.

He has something to say about delay and about costs and is exercised that litigants without a sense of proportion should have the judicial resources of the state placed at their disposal, and he recalls these words spoken by Lord Justice Knight Bruce about a squabble over £10:

> "upon a matter that, if they had not good sense enough to settle it for themselves some respectable neighbour would probably upon application have adjusted for them in an hour . . . the career of cost, and heat, and hatred, of reproach, scandal and misery, in which they are now engaged, of which neither this day nor this year nor perhaps another will, I fear, see the end, and which seems well to exemplify an old English saying, that the mother of mischief is no bigger than a midge's wing."

To the continuing debate about law reform Mr. Bennion can be said to contribute something of value.

FLORENCE O'DONOGHUE.

THE CHARTER CONTROVERSY IN THE CITY OF LONDON, 1660–1688, AND ITS CONSEQUENCES. By JENNIFER LEVIN. [London: The Athlone Press. 1969. 119 pp. inc. index. 35s. net.]

THIS latest addition to the *University of London Legal Series* confines itself to the study of a single case in its historical context. The "charter controversy" referred to in the title was the *quo warranto* proceedings by the Crown against the City of London in 1683. Mrs. Levin's monograph amply supports her contention that this case has been unjustifiably neglected by legal historians. However, as one of the most important political trials of this troubled period (it is reported in *State Trials*, Volume VIII, Cobbett edition, 1810) it has not been overlooked by political and constitutional historians. The historical setting, outlined by Mrs. Levin in her first two chapters, was the political crisis created by the Whigs under Shaftesbury which Charles II faced towards the end of his reign. The Charter controversy, in London and elsewhere, was an attempt by the King to deal a mortal blow to the source of Whig power in London and the other chartered cities and boroughs up and down the land. Mrs. Levin gives us sufficient political history in the country at large, and more especially in the City's relations with the Crown, to place the London case of 1683 in its proper context. One would wish (especially in a book of only a hundred small pages at a price of 85s.) that the publisher had allowed or encouraged the author to give those readers who are not specialists in the later Stuarts a more ample account of this seminal period in the growth of the political parties. However Chapter II, on "Events in London," is more satisfying in giving a fuller explanation of the political atmosphere produced by the clash of rival ideologies.

Mrs. Levin suggests that the London case of 1683 has been neglected by those who have written on the history of corporation law because its brief judgment, in marked contrast with the careful and elaborate arguments of counsel on either side, is very inadequate. The pressures brought to bear by the Crown upon the judges of the King's Bench (one was dismissed and the Chief Justice was removed to the Common Pleas and replaced) go far to explain the poor quality and brevity of the judgment. The legal interest of this study, originally an LL.M. dissertation, lies in the author's careful examination and critique of the arguments and counter-arguments for the Crown (Mr. Solicitor Finch and the Attorney-General Sawyer) and for the City (Treby and Pollexfen).

She is able to show that some of the most important concepts and theories of corporate personality are debated at length for the first time in a common law court. They include the basis of legal personality (the Crown favoured the concession theory and the City the fiction theory), what acts by its officials or organs bind a corporation, its capacity to commit a crime, and the *ultra vires* doctrine. Counsel on either side also displayed much other technical and ancient learning rather closer to the nub of the legal and constitutional dispute. This centres on the right of the Crown to forfeit the charter of a corporation in general, and of the City in particular on the charges alleged against it and under the form of proceedings adopted. After the King's Bench had delivered its judgment the City obtained conflicting legal advice as to its effect, but by a narrow majority still refused to surrender its charter. In the last two chapters Mrs. Levin recounts the surrender of charters by cities and boroughs up and down the country. This mass surrender of charters, enabling the Crown to remodel local government, was one of the objects the King had in bringing the City to heel. It was intended to reap the political benefits of securing a Tory majority for the King in the Commons. In her last chapter Mrs. Levin examines the legal validity of the surrenders, which under James II continued up to the Revolution of 1688. As with the power of forfeiture, the crucial question linked with the act of surrender was whether, and to what extent, this worked a dissolution of the corporation.

It is possible to take issue with the author in her assertion (p. 75) that the arguments of Treby for the City show that the *ultra vires* doctrine applies to chartered corporations. Though the term *ultra vires* is not used, Treby contends that the City could not be found guilty of criminal libel, and that an illegal by-law affecting markets in the City was not valid, because such acts were not within its powers as set down by the Charter. Mrs. Levin supposes that this disproves the commonly accepted view that the *ultra vires* doctrine does not apply to chartered corporations. Elsewhere (p. 101) she concedes that this doctrine "was not of course fully elaborated until the mid-nineteenth century. . . ." If lawyers like Coke are often rightly accused of distorting the history of law to suit a legal argument, so legal historians sometimes mistake legal history for modern law. Whatever the arguments of Treby may establish about legal opinion in the seventeenth century, they are of slight force compared with a steady stream of dicta from Blackburn J.'s judgment in *Riche* v. *Ashbury Carriage Co.* (1874) L.R. 9 Ex. 224, at pp. 263–264 onwards. These cases establish that the *ultra vires* doctrine developed by the judges to contain the new statutory and registered companies did not apply to corporations created by charter. Moreover, the arguments of Treby on this point (see p. 45) appear to be directed to the narrower question of capacity to commit a crime.

Mrs. Levin's task was certainly worth undertaking, and she has performed it extremely well.

A. J. Boyle.

The Popular Movement for Law Reform 1640–1660. By Donald Veall. [Oxford: Clarendon Press, Oxford University Press. 1970. 259 and xxvi pp. 60s. net.]

This book has a special fascination at a time when law reform on a large scale is happily the fashion once again, and the Law Commission and other bodies labour to that end. Mr. Veall has produced a most enjoyable and scholarly book on a movement which has hitherto suffered from quite undeserved neglect. In the first two chapters he sets the scene with an excellent survey of all the injustices, abuses and sheer inadequacy of the law, lawyers and the courts of the early seventeenth century. Many of the abuses which produced the greatest political resentment were to be found in the prerogative and ecclesiastical courts. These of course were swept away at the beginning of the Long Parliament. But this did not long content the many critics not only of the Chancery, now in the hands of the Commissioners of the Great Seal, but of the common law itself.

Although the triumph of Parliament was also a victory for the common lawyers, critics of the new established order, both lawyers and laymen, soon began to attack what they regarded as an instrument of oppression and corruption, threatening the rights of freeborn Englishmen as much as Kings or bishops. Throughout the period there was agitation in the army, in the City of London, and especially among what we would now call the lower middle class. This was expressed in the tracts and pamphlets of various groups pressing for a wide range of reforms. This agitation reached particular intensity during the Leveller movement, culminating in the trial of John Lilburne in 1649, again during the Barebones Parliament of 1653 (which had a much smaller proportion of lawyers than other Parliaments of the period) and finally in 1659 shortly before the restoration of the monarchy. The levellers used remarkably modern techniques to spread their ideas not only by pamphlets and their newspaper, but by mass petitions, public meetings and an elaborate party organisation.

Mr. Veall makes the important point that legal historians have wrongly dismissed the law reform movement of this period as jejune, impractical and even fanatical. Holdsworth and more recent writers concluded that their ideas were not only unlikely of acceptance in the seventeenth century but at any time! Mr. Veall's careful study of the Thomason Tracts in the British Museum, and his reliance on Mary Cotterell's recent research on the Hale Commission in 1652, put the moderate law reformers of this period in a truer perspective.

Mr. Veall divides the various pamphleteers into five groups: the levellers, the diggers, those few who believed in the superior merits of the civil law, the moderate reformers (including the members of the Hale Commission), and, finally, a group opposed to any serious law reform beyond such changes as had been introduced by Parliament before the interregnum. The more extreme proposals of the levellers and the diggers may merit the strictures of Holdsworth and others. They were not lawyers, were highly suspicious of lawyers and wanted to replace the common law and its courts with the kind of over-simplified code which tends to be the layman's panacea in their age as in our own. They looked back to a golden age before the Norman Conquest when the local communal courts of county and hundred distributed an even handed justice, free of all jargon and technicality, that everyone could comprehend.

The moderate reformers consisted largely of members of the Bar of some ability, including Matthew Hale, perhaps the ablest lawyer of his age. Drawing upon Mary Cotterell's research, Mr. Veall shows that there was a large contingent of such talent on the Hale Commission, in addition to Hale himself. Many of the others had been educated in the inns of court or had practical legal experience as J.P.s or attorneys. The minutes of the seventy-two meetings (from January to July 1652) of the Commission, and of its specialist committees, disclose that they adopted a very businesslike approach to their task and that the level of legal argument reached a high technical plane. Their conclusions were prepared (like those of our own Law Commission) in the form of sixteen draft bills (sometimes referred to as "The System of Law") to be scrutinised by the Parliamentary Law Committee. (The official title of the "Hale Commission," as it is usually known, was the "Extra-Parliamentary Committee for regulating the law.") Nearly all their proposed reforms and those of the other moderate reformers have been carried out in the succeeding centuries.

Many of the items in the seventeenth-century law reformers' programme have a remarkably contemporary ring. Thus one hears of codification (and the need to prohibit judicial glosses), of the decentralisation of the courts, of the fusion of law and equity, and of the reform or abolition of the jury system. There was also much discussion of the need to reduce the expense and delay in civil litigation. Suggestions included a fixed date for trials, or the imposition of a strict time limit between writ and judgment on parties and on the courts. Not only was the corrupt system of fees charged by court officials to be abolished (and their number reduced), but it was even proposed that all lawyers should be salaried officials. A much more drastic fate was proposed for lawyers in the radical schemes of the diggers and levellers. There were widely supported schemes for various systems of registered land as well as other schemes for deeds registries. Some voices were even raised for legal aid certificates based on a prima facie case and evidence of need, for a system of rent control, and for the state ownership and development of all commons and forests.

There is also a familiar quality in the arguments against any change in the law as well as in the tactics adopted by the legal establishment, in and out of Parliament, to block law reform. Cromwell, when he could spare his attention, took a considerable interest in law reform, but in the end he was brought near to despair that anything could be achieved against the entrenched opposition of the bulk of the legal profession. He complained of the three months spent by lawyers in Parliament arguing about the meaning of the word "incumbrance" in a bill to introduce a system of registered land. In this way the bill, like many another, was talked out. Part of the problem, as with the law reform today, was of finding legislative time and political backing. But the fact that so little came to fruition was primarily due to powerful organised opposition from important figures and groupings in the political and legal establishment. For example, Bulstrode Whitelocke, one of the Commissioners of the Great Seal and for several years a member of the Council of State, was only prepared to countenance the most minimal reforms. He was a member of the Parliamentary law committee which was so adept at shelving bills to reform the law. This failure was clearly linked with a wider failure to achieve a generally acceptable political and constitutional settlement during the upheavals of the Commonwealth and Protectorate. Even if the law reforming movement had been allowed to make greater headway, their work would have been doomed in the general shipwreck of the English republic.

Some changes were introduced without legislation and in an informal way which did not attract the attention of contemporaries. Certain improvements in our criminal procedure, especially in the trial of political offences, managed to survive the Restoration, despite some back-sliding. Mr. Veall makes very illuminating use of the four political trials of John Lilburne, two before the civil war and two on much more serious charges during the interregnum. He shows how the right of the accused to present his defence in a fearless and untrammelled way had developed, and how the independence and fair mindedness of the judges had changed for the better even in trials of crucial political significance for the executive.

There are one or two points in the introductory chapters to which some exception can be taken. On page 38 the discussion of the well-known forty shilling rule in the Statute of Gloucester in 1278, which put a lower limit on the jurisdiction of the royal courts, blurs what the statute provided with the judicial construction subsequently put upon it. The explanation of the precarious position of the copyholder in the seventeenth century does insufficient justice to the protections which the common law courts had by this time extended to copyholders. The statement, on page 54, that socage "was the tenure that eventually became freehold" looks a little odd to the legal historian. In discussing the state of the land law in the seventeenth century, something at least should have been said of the complicated consequences of the Statute of Uses for the growth of future interests. It was this state of high confusion, Cromwell's "godless jumble," which the common law courts had allowed the statute to produce through their vacillating changes of policy towards it.

This book is a most important contribution to the legal and social history of the seventeenth century. It is written in a very clear and readable style. The ample and intelligently arranged bibliography is particularly to be commended.

A. J. BOYLE.

DELICTUAL LIABILITY AND THE CONFLICT OF LAWS. By OTTO KAHN-FREUND. [Recueil des Cours, 1968 II 1.]

WITH the decision of the House of Lords in *Boys* v. *Chaplin* [1969] 3 W.L.R. 322; [1969] 2 All E.R. 1085 problems of tort have become the *dernier cri* in the conflict of laws in this country, thus making most fortunate, if fortuitous, the timing of the publication of Professor Kahn-Freund's five lectures delivered at the Academy of International Law at the Hague in July 1968. The only pity is that the lectures were given too soon for them to contain a discussion of the case in the Lords and yet have been published too late for them to have exerted any influence on the decision itself and, in particular, on its *ratio decidendi*. For, whatever the merits of the actual result reached in *Boys* v. *Chaplin*, their Lordships' reasons for arriving at that result are disappointing. The whole approach to the problems involved compares unfavourably with their masterly handling by Professor Kahn-Freund in his erudite and wide-ranging discussion, a discussion which is grounded upon a familiarity with all the relevant material—judicial decisions, legislation, quasi-legislative documents, scholastic theories—on a world-wide basis.

The first lecture, without more, demonstrates the particular value of a comparative analysis in this field. It is an oddity of this country's conflicts rules that, whereas the courts have for long been content to apply foreign laws in matters of contract, property, succession and family law, they have continued to apply the *lex fori* in matters of tort. The genesis of this predilection for the *lex fori* in this field, explains Professor Kahn-Freund, is to be found in Germanic theories which were advanced in the 1840s at a time when tort had not become emancipated from crime, and which were then received into our law in *The Halley* (1868) L.R. 2 P.C. 193. Professor Kahn-Freund then proceeds to show how this early championship of the *lex fori* was gradually rejected, first in Germany itself before the end of the last century, and then not only throughout the Continent but, spreading outside the civil law to the common law, throughout the U.S.A. Against this background of a general turning-away from the *lex fori* as basically irrelevant, today's continued adherence to the rule in *The Halley* is exposed as totally out of date.

On the Continent and in the U.S.A. it was of course upon the *lex loci delicti* that the mantle originally worn by the *lex fori* fell. As is rightly pointed out by Professor Kahn-Freund, the justification for the adoption of the *lex loci delicti* as the controlling law is that it leads, in the vast majority of cases, to the protection of expectations, whether the expectations of potential tortfeasors or of potential victims. But undoubtedly there are some situations in which a single-minded application of the *lex loci delicti* would be ill-advised, and this fact has recently led to a reappraisal of its appropriateness so that, as the second lecture reveals, the *lex loci delicti* is today facing its own crisis. The great danger is that, if the *lex loci delicti* is moved from the seat of authority, its place may be taken not by the "proper law of the tort"—because that concept is felt to be too vague, too "nihilistic," to be relied upon as a norm—but by, once again, the *lex fori*. Accordingly, Professor Kahn-Freund rightly insists that the *lex loci delicti* must retain its pride of place as the norm, but a norm which can be displaced when, exceptionally, the situation demands. However, in order to make this a practical proposition, what is to be regarded as exceptional for these purposes must be spelt out in some detail. This is attempted in the third and fourth lectures which form the core and, in my view, the most creative part of this study—the fifth lecture, which seeks to show how some of the tort problems can be escaped by resort to a contract classification, is, I feel, more peripheral, less compelling. The third lecture deals with the total displacement of the *lex loci delicti*, which is considered appropriate where a special relation exists between tortfeasor and victim or where tortfeasor and victim are together in an insulated environment; the fourth deals with the most difficult type of case, that requiring partial displacement, where the *lex loci delicti* steps down only in relation to some of the issues involved in the case—in relation, for instance, to the issue of damages but not to the issue of standard of liability.

There is indeed little to criticise in these admirable lectures. It is perhaps unfortunate, in view of the implication of complete coverage of the tort field given by the title of these lectures, that the whole study should be centred on transport accidents and that, in particular, economic torts should be left out of account. But complete coverage, at this intensity and detail of treatment, would be an impossibility, and there is justification both for concentrating on the transport accident which in practice is easily the most important subject and for excluding economic torts which, in Professor Kahn-Freund's view, require a special treatment all of their own; all that is really needed is an appropriate change of emphasis in the general title. Also, one may not always agree with the proposed solutions to particular problems; but this is no matter, for Professor Kahn-Freund expressly eschews dogmatic solutions, regarding his work as, in his own words, a contribution to an evolving discussion which is designed to stimulate the thoughts of others. Nevertheless I would think the occasions for disagreement are likely to be very rare. Indeed, for myself, about the only point on which I would take issue with Professor Kahn-Freund is that I find it hard to accept that, if a fatal accident should occur in the jurisdiction in which the tortfeasor has his home, the question of whether an action will survive for the benefit of the deceased's estate should be governed by the deceased's personal law at the time of his death, or the question of which members of the deceased's family may claim for their personal loss should be governed by the law regulating the relation between the deceased and the family member; or indeed, conversely, if the accident should occur in the jurisdiction which is the home of the deceased victim and his family, that the question of whether an action will survive against the estate of the tortfeasor, if he too is killed, should be dictated by the personal law of the tortfeasor at the time of his death. Surely in these circumstances the all-important criterion of protection of expectations points to the *lex loci delicti* remaining in control and not being displaced.

I have tried to demonstrate elsewhere (33 M.L.R. 14–15) that, by a freakish operation of the doctrine of precedent, *Boys* v. *Chaplin* has in fact decided precisely nothing. But even this contention aside, it can be safely predicted that *Boys* v. *Chaplin* does not mark the end of the judicial story in the tort field. Those who are eager to be in on the *dénouement*, or to contribute to the development of the storyline, can arm themselves with no better discussion than is to be found in these definitive lectures with their vast scholarship, telling argument, and great good sense.

HARVEY MCGREGOR.

THE PRINCIPLES OF MODERN COMPANY LAW. Third edition. By PROFESSOR L. C. B. GOWER, A Law Commissioner. Co-editors: K. W. WEDDERBURN, Cassel Professor of Commercial Law in the University of London, and O. WEAVER and A. E. W. PARK, Barristers-at-Law. [London: Stevens & Sons. 1969. lxxviii and 716 pp. (inc. index). Bound £5, Paper £2 5s.]

THE reappearance of *Gower*, as it is now familiarly called, is an important event, both for practitioners and students. In the sixteen years of its existence, it has already made a name for itself with its specifically analytic approach to its subject, to which its reverend seniors in the company textbook field are less well adapted, indispensable though they are for other purposes.

To many, the subject of "company law" suggests primarily that branch represented by the provisions for liquidation, in which field, as was also noted in the review of the second edition ((1958) 21 M.L.R. 330), *Gower* is very brief—one chapter of twenty pages. But in the modern commercial and legal world, the scope of company law, both academically and in statute and case-law, is increasingly wide, and the law of living companies is now of considerably greater depth and import than that of dead or dying companies. Indeed, much of the recent additions in the statutory and administrative field are designed at least in part to anticipate, if not to ward off, a company's demise, whether by manslaughter or suicide! In this field *Gower* is excellent, both in its analytical and practical approaches.

In the preparation of the new edition, Professor Gower, who has been a Law Commissioner since 1965 (to which office he has just been reappointed), has been assisted by three distinguished collaborators from the academic world and from the Bar, and the work covers a period of eleven years which have been marked, first, by a spate of legislation directly or indirectly impinging on the constitution, operation and control of limited companies, of which the Companies Act 1967 is only the major example; secondly, by a great extension of the powers of the Board of Trade (and their more vigorous exercise) to appoint inspectors and itself to take proceedings to wind up or to sue in the name of companies so investigated; and, thirdly, the growth of the extra-legal and self-regulatory powers of the City of London, represented by the *City Code on Take-Overs and Mergers*, and the so-called "Watchdog Panel."

These three areas of activity reflect in fact two general developments in the field of company law. The first is the growing awareness that the increasing size and complexity of commercial operations, and the increasing size of the corporate groups which carry them on, raise social and even political questions going far beyond the traditional bounds of the judicial control of corporate activity. The second is the growing realisation that the necessary controls and protective measures can no longer be provided solely by the judiciary in the exercise of their conventional company jurisdiction, but must be supplemented by the actions of great state organs such as the Board of Trade and the Monopolies Commission (soon to be supplemented by the Commission on Industry and Manpower), and by the collective conscience and power of the commercial world itself. A particular value of the new edition is the continued study of these new directions of development, and a survey of the necessary reforms and of the extent to which they have been implemented.

This edition maintains the admired historical introduction on the origin of limited companies and on the consequences of incorporation, which has also been brought up to date by, for example, an analysis of the recent cases involving the "Acquisitions of the Company's Shares by it or by use of its Assets," to which, in Chapter 6, a special section is devoted under that heading. The authors there draw attention to the gradual sharpening of the teeth of section 54, once regarded as largely ineffectual, but now with such cases as the group entitled *Selangor United Rubber Estates Ltd.* v. *Cradock*, and *Steen* v. *Law* [1964] A.C. 287 (P.C.) (an Australian case) taking on a new lease of life and exercising the control intended by the Greene Committee: see the remarks of Lord Greene M.R. in *Re V.G.M. Holdings Ltd.* [1942] Ch. at p. 239. The summary of the decisions in civil cases under section 54 might be supplemented by a reference to the recent criminal convictions for conspiracy to infringe the provisions of section 54, the principal of which is reported as *R.* v. *Sinclair* [1968] 1 W.L.R. 1246 (C.A.) (more fully reported at [1968] 3 All E.R. 241), which further sharpened the teeth of the section.

The chapters entitled "Directors' Duties," "Controlling Shareholders' Duties," and "The Enforcement of Directors' and Controllers' Duties," constitute a useful study of the problems and temptations presented by the possession of directorial and/or shareholders' control, and the extent to which the directors may have regard (or should be entitled to have *more* regard) to the interests of persons other than members, and the extent to which the controlling shareholders may not be entitled to have regard *solely* to their own interests. The analysis in the first-mentioned chapter of the House of Lords' speeches in *Regal (Hastings) Ltd.* v. *Gulliver* and in *Phipps* v. *Boardman*, relating to the fiduciary position of directors, are good examples of the *Gower* technique, as is also the history (never previously appreciated by your reviewer at least) of the *Greenhalgh* and *Mallard* and *Arderne Cinemas* litigation, relating to "Frauds on the Minority," which extended to seven actions and five appeals!

"The rule in *Foss* v. *Harbottle*," in relation to the rights of shareholders to sue in the name of the company for wrongs done to it, is well restated in the light of recent decisions. We owe to the vigilance of Professor Wedderburn the very belated reporting of the important decision of Buckley J. in *Hogg* v. *Cramphorn Ltd.*, heard in 1963 but not reported until 1967, just in time to form part of the defendants' arguments in *Bamford* v. *Bamford*, where it was approved by the Court of Appeal; thereby the right of directors, whose actions as a board are invalid for want of authority or of an independent quorum, etc., to obtain the blessing of a general meeting of the company was established. Your reviewer would like to pay tribute to an earlier example of *Gower's* vigilance, in the second edition, where alone among the textbooks was noted the decision of Romer J. in *Re Thomas Mortimer Ltd.* (only reported in a banking work), on which the Court of Appeal founded their judgment in *Re Yeovil Glove Co. Ltd.* [1956] Ch. 148, as to the right of a bank to "feed" subsequent advances through a newly created floating charge without risk of impeachment under section 322. Such incidents show that the law-reporting net may still have holes in it.

In Chapter 25, "The Enforcement of Directors' and Controllers' Duties," the statement of shareholders' rights of action is appropriately followed by a study of Board of Trade investigations. The possession by a shareholder of such rights may often be valueless, unless vital information, or the disclosure of crucial documents, can be extracted from the company and its controllers by some executive process; similarly, if shareholders have not the means and/or the nerve to sue and start an expensive action, the Board of Trade may have to take up the cudgels on their behalf.

Such investigations, however, present their own problems, both as to the probative value of the reports they produce, and as to the personal hazards to the individuals interrogated; the authors comment (at p. 610): "These provisions have given rise to some disquiet, as the report may make highly damaging allegations based on evidence not all of which would otherwise necessarily be admissible in a court of law." Such disquiet was forcibly echoed the other day by counsel appearing for Mr. Maxwell and his colleagues in the Pergamon Press investigation, in seeking (unsuccessfully) to fetter the inspectors' liberty of interrogation. One would welcome the authors' views as to how the admissibility of such a report (in the words of section 171) "in any legal proceedings as evidence of the opinion on the inspectors in relation to any matter contained in the report," should be clarified; for in each of the three 1967 decisions cited at pages 610–611, the report appears to have been regarded as of evidential value only if unchallenged.

There are some useful observations in the same chapter on "Orders under Section 210," *i.e.* for the relief of an oppressed minority, which underline the unsatisfactory results of the decided cases, as compared with the intentions of the Cohen Committee, whose report inspired the section, and the views of the Jenkins Committee. To the criticisms (at pp. 601–603) of the decision in *Re Bellador Silk Ltd.* may be added the fact (which does not clearly appear from the reports) that even if the company was solvent on a going concern basis it was the judge's view that the costs of and losses resulting from the liquidation would themselves produce such a deficiency of assets as would disqualify the petitioner from petitioning.

The self-regulatory powers assumed by the City of London in the *Take-Over Code* are dealt with both in a specific chapter, "Reconstructions and Take-Overs," and also under "Nature and Classification of Company Securities," and under "Directors' Duties." Space no doubt did not permit the inclusion of the text of the current "Stock Exchange Requirements for Admission of Securities to Quotation," although the important provisions of Schedule 8, para. 15, thereof are referred to, which in principle require the issue of equity capital to be made to existing equity shareholders. It would be interesting to have the authors' views as to the likelihood that such requirements as these would become recognised by the courts as constituting criteria of good and bona fide administration by directors, and their neglect a justification for such bodies as the Stock Exchange and the Take-Over Panel to intervene in take-over battles by the exercise of their extra-legal powers, so as to influence either the result or the action of the antagonists; for example in *Bamford* v. *Bamford* (although this does not appear from the reports) the company whose board was being accused of having issued a parcel of shares to an ally to strengthen their hand against the bidder, had its quotation suspended by the Midland Stock Exchange, a step which might well have influenced the outcome, though in fact it did not.

Despite the necessary brevity of the chapter on "Liquidations," it might have been helpful to enlarge a little further on the operation of section 227, as to the validation of dispositions made or proposed to be made during the currency of a winding-up petition. In *Re A. I. Levy (Holdings) Ltd.* [1964] Ch. 19 (which is not there cited), the court held that it had power to validate in advance an intended disposition which appeared to be for the benefit of the company and its creditors. References might also be desirable to the general principles of mutual credit and set-off applicable in winding up, as recently restated in *Rolls Razor Ltd.* v. *Cox* [1967] 1 Q.B. 552 (C.A.), and to the significance of the decision in *Re Bros Films Ltd.* [1968] Ch. 565, in treating the summoning by a company of a meeting of its creditors as equivalent to an act of bankruptcy so as to disallow the set-off, against a debt due to the company, of a debt specifically acquired from a creditor for the purposes of set-off.

The book is handsomely produced and adequately indexed. It was produced with great expedition, the law being stated as at May 1, 1969, and the publication date being September 16, 1969. At £5 for the bound edition, it is very good value, while for students the paperback edition at £2 5s. is a real bargain.

Muir Hunter.

The Criminal Responsibility of Corporations in English Law. By Dr. L. H. Leigh. [L.S.E. Research Monographs Number 2: Weidenfeld and Nicolson. 1969. vii and 221 pp. £2 16s.]

The problem of the liability of juristic persons in criminal law has beset lawyers for many years. It is an area full of theoretical problems which have largely been ignored by the judges, who have taken a robust approach to the situation, dealing with each case as it arose apparently according to their view of the needs and justice of that particular case. In such a context, of course, it is difficult, if not impossible, for the researcher or textbook writer to produce a comprehensive set of principles, and such is the confusion of case law and statute that it is almost as difficult to produce anything comprehensible.

There appear to be three areas for consideration in relation to the problems of corporations and criminal law. The legal or theoretical; the sociological; and the criminological problems. The first is concerned essentially with questions such as the nature of legal personality; the attribution of *mens rea* and *actus reus* to juristic persons; procedural difficulties; and the limited capacity and powers of juristic persons such as *ultra vires* and the impact of this on criminal actions. The second is concerned with questions as to the detailed operation of the corporation in practice; such as what does it do; how is it managed; are there marked differences between the large corporation with many members and the one-man company? The third is concerned with questions as to what it is hoped to achieve by attributing criminal responsibility to juristic persons; and having determined to make them criminally responsible, what is the most appropriate sanction or punishment to use These three areas are not independent, and the answers to the questions in one area may be influenced, if not determined, by the answer or information obtained in one or both of the other areas. For example, if sociological research shows that in practice corporations are generally controlled by one or a few individuals, legal theory may be justified in holding the corporations criminally responsible for their activities.

Dr. Leigh's book, which is based upon his thesis for a Ph.D. of London University, is concerned very largely with the first area—an analysis of the legal concepts and techniques used in attributing criminal responsibility to corporations. He devotes less attention to criminological matters, and barely considers whether the law produces any worthwhile results in its operation. An important area of debate in relation to companies at present is the adequacy and practicality of having a single corporate form for business purposes governed basically by a single set of rules. There are great differences between the modern conglomerate business and the large-scale vertically integrated concern. Each presents widely differing problems to the politician, the economist and the lawyer. Both also have little in common with the corner sweet-shop incorporated solely because of the need for limited liability or because it is thought to confer some advantage in relation to taxation. Obviously, such divergences need to be considered when deliberating upon whether and under what circumstances to impute criminal liability to a corporation. The questions of control and management will receive different answers in each case; the issues of social and economic policy will have different factors to be taken into account. The large corporation with many shareholders, creditors, suppliers, customers and employees, involves the consideration of many more interests than the one-man company. Unfortunately, these aspects of the problem have not been discussed by the courts in the cases before them. Each company is approached as though it is identical with all others. In the sense that it is a legal entity it will be the same, but in non-legal terms it differs from other companies just as much as one physical person differs from another. It is equally unfortunate that Dr. Leigh also spends little space discussing these issues.

In relation to the purely legal problems, Dr. Leigh gives a thoughtful and thorough analysis. The English courts appear to have two bases for rendering corporations criminally liable—vicarious liability; and the doctrine of the *alter ego* which purports to identify some person as being the corporation for particular purposes. Dr. Leigh on occasions appears to think that these two are basically the same. In one sense this is true—the corporation in both cases is made liable for the acts of its agents or servants. However, there do appear to be important distinctions between the two concepts. Vicarious liability applies to all servants; *alter ego* by definition only to particular types of servant. Vicarious liability, when it applies, only operates if the servant was acting in the scope of his employment. It is by no means clear that the *alter ego* doctrine applies only when the controlling mind is so acting. Dr. Leigh, who appears to take a rather bureaucratic view of corporate criminal responsibility, would support the application of *alter ego* notions only when the controlling mind is carrying out corporate policy. His view is that criminal responsibility should be imposed with a view to regulating the conduct of corporate affairs and to promoting adequate supervision of those affairs by the higher executives. This may, in practice, ultimately turn out to be the most sensible justification for applying criminal sanctions to corporations, but how far it meets the practical realities of modern corporate management is difficult to estimate.

On the whole, Dr. Leigh has provided a comprehensive survey of the existing case law, drawing frequently upon American and Canadian decisions to fill gaps in English law or to suggest alternative methods of approach. There are, however, areas, within his terms of reference, that he does not discuss. How far can a company attempt a crime, or incite others to commit offences? If the basis of corporate criminal liability is identification of the wrongdoer with the company, how relevant are defences such as insanity or duress, and when, if ever, can they be set up by a company? Nowhere are the questions of receiver and liquidators considered—are these ever the controlling mind of the company? One surprising omission occurs on page 57 in discussing whether the corporate mind can be composed of a number of individual minds. Dr. Leigh refers to *Armstrong* v. *Strain*. The matter was discussed for civil purposes in *London County Freehold* v. *Berkeley Properties* (1936) and there are some interesting observations on combining two minds in *Woyka* v. *London & Northern* (1922), neither of which are mentioned.

Finally, the presentation of this book must be severely criticised. It is badly printed, and badly arranged for use by a lawyer. Misprints abound. The spacing between words is variable. In fact, the spacing between lines varies on many occasions. However, the worst feature of the book is the treatment of footnotes and indexes. Footnotes are relegated to the end of the particular chapter. Anyone wishing to use this book will be frustrated, if not infuriated, by having his reading broken up by the need to refer several pages further on to discover the authority for a proposition in the text. As some chapters contain over 100 footnotes, some of which have considerable learning and information in them, the difficulty is not inconsiderable. The tables of cases and of statutes do not contain references to the pages of the text where the case, or statute, is discussed, thereby limiting the usefulness of this valuable book to other researchers, or even less elevated readers. The series is designed to produce works of scholarship for use by specialists. Unfortunately, the format renders it of little practical use for such people. At £2 16s., for its size, this book is not cheap, and a purchaser should be entitled to expect something more pleasing in presentation and far more usable for his work in the subject.

R. S. NOCK.

THE COMPANY: LAW, STRUCTURE AND REFORM IN ELEVEN COUNTRIES. Edited by CHARLES DE HOGHTON. [London: George Allen and Unwin. 1970. 394 pp. £5 5s.]

THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970. By JAMES WILLARD HURST. [Charlottesville: University Press of Virginia. 1970. xiii and 191 pp. $6.50.]

THESE two books have an underlying similarity of method and treatment: they both deal with the law by questioning its appropriateness and effectiveness from the standpoint of the social and economic aims which contemporary opinion considers it has or should have. In all other respects the books differ, but it is nevertheless interesting and informative to compare them.

De Hoghton's book consists of edited versions of papers presented by lawyers, economists and sociologists from eleven countries at a conference on "The Future of the Enterprise and the Reform of Company Law" which PEP (Political and Economic Planning) held in 1967. The contributors came from the EEC countries, the United Kingdom, the U.S.A., Sweden, India, Japan and Jugoslavia, and with the exception of the last three, their papers have been divided so that different topics discussed at the conference are dealt with systematically in separate chapters. The book begins with a brief account of the different forms of business organisations in the eleven countries, and then plunges into the polemical material, namely, the objectives which companies have under existing law and the objectives which they should have (*e.g.* providing employment on fair terms, satisfying consumers' needs and improving standards of product and service, being the "good and responsible citizen"). The third part of the book then examines the organisation of companies so as to see how far the relevant law and practice do protect and foster the interests of shareholders, employees, consumers and the public.

Inevitably the quality of the material included in a book of this kind varies enormously. The existing law in Britain, France and Germany is presented accurately and with commendable conciseness; the exploration of possible future developments in the law, having regard to the range of current published opinion, is carefully related to the law as it now stands, and alternative possibilities are investigated. The American contributions, on the other hand, are so weighted with sociological material that it is impossible for an uninstructed reader to ascertain what the existing state of the law is, and in many places very advanced sociological ideas are presented with no qualification to show that they would be summarily rejected by the vast majority of American businessmen and lawyers. To a less extent the same remark can be made about the Belgian material, though here the criticism is that the existing law is given insufficient emphasis rather than that it is completely submerged.

More specific criticisms are that the rules in *Royal British Bank* v. *Turquand* and *Foss* v. *Harbottle* are misstated on page 77; it is not true that in equity a director is incapable of contracting with his own company, as stated on page 149; and despite the opinion expressed on page 185, the Board of Trade exercises no control over new issues of shares and debentures under the Licensed Dealers (Conduct of Business) Rules 1960, since new issue business is expressly excluded from the governing legislation, the Prevention of Fraud (Investments) Act 1958, by sections 2 (2) and 14 (2). On page 241 it is stated that a member of the supervisory board of a German public company can also be a member of the supervisory board of up to five of its subsidiaries without counting them toward the maximum of ten supervisory board memberships which may be held by any one individual. The privilege is given by the German legislation, *Aktiengesetz* of 1965, para. 100 (2), to directors or managers of the holding company, not to members of its supervisory board, and the purpose is to enable such directors to supervise the management of subsidiaries of which they are not themselves directors. These four comprise all the slips which this reviewer could find, however, which speaks highly for the general standard of accuracy of the book.

The second book under review is a revised version of three lectures given by Professor Hurst at the University of Virginia in 1969. Their subject was a comparison of the content and effect of company law in the United States since 1780 with contemporary social and economic objectives and ideals. By "legitimacy" Professor Hurst understands the correspondence of the law with such objects and ideals, and the conclusion he reaches is that company law has since the 1880s been largely neutral in this respect. He discounts a great deal of the early fulmination against companies as dangerous aggregations of economic power and devices for defrauding creditors, but he is duly critical of the lax legislation in New Jersey, Delaware and certain other east coast states from the end of the nineteenth century onwards which was intended to induce promoters and directors to incorporate under the law of the particular state so as to maximise its revenue from fees and taxation. He also sees in clear perspective the limited aims and effect of the federal legislation during the 1930s which was intended to protect the small, uninformed and often gullible investor, and he assesses accurately the limited protection afforded to small investors by the holding of sizeable blocks of shares in a company by institutional investors. Because Professor Hurst's book is based on a series of lectures, it lacks detailed factual information and a detailed examination of the relevant common law and statute law—in fact the law is hinted at rather than expounded, so that the reader needs a fair understanding of American law and social and economic history before he begins. Nevertheless, it contains a number of new views on the significance of changes in law and opinion, and, being the work of one author, it does not suffer from the unevenness of presentation which is the unavoidable handicap of De Hoghton's book.

R. R. PENNINGTON.

DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY. By KENNETH CULP DAVIS. [Baton Rouge: Louisiana State University Press. 1969. xii and 233 pp. $8.50.]

PROFESSOR DAVIS is a most remarkable administrative lawyer: encyclopaedic in his knowledge and understanding of the American administrative process in its legal context, an immensely prolific writer, an incisive critic, a proselytising zealot for administrative justice, a tireless and dedicated research worker, a forthright and pugnacious controversialist. His international standing is assured by his works; but among lawyers who are not administrative law specialists his writings are not as well known as they should be, because he has placed his emphasis heavily on administrative procedure and judicial review in the law of his own country. The publication of *Discretionary Justice* will be warmly welcomed by his admirers, not merely because it is an exceptionally thought-provoking work but also because it is an important contribution to the general literature of jurisprudence and will be widely read by non-specialists.

As he writes in his Preface: "Administrative law literature is devoted mainly to the 10 or 20 per cent. of administrative action that involves either formal proceedings or judicial review, and it largely neglects the 80 or 90 per cent. that escapes both formal proceedings and judicial review." His work, based on lectures delivered at Louisiana State University in 1966, is a selective survey of aspects of authorised and unauthorised discretionary action by public authorities and officials, and a preliminary exploration of the problems raised by a tour of this inadequately mapped terrain. In his method of approach, Professor Davis is uncharacteristically tentative: he asks questions, suggests what questions others may ask when they embark on a more thorough examination, and indicates the direction of his own thinking about some specific issues. But this is not a meandering academic ramble, a philosopher's monologue or a coyly bashful pirouette. Every few pages one comes across the italicised phrase, the pithy assertion or the emphatic generalisation; and one glimpses a vision of a thrusting finger at Baton Rouge. Professor Davis's sub-title might be paraphrased as "I am Curious." A book with that sub-title may still leave little to the imagination.

Professor Davis accepts a broad dichotomy of rule and discretion, though his analysis of the concept of a "rule" does not probe deeply into jurisprudential definition. Administrative discretion is not to be equated with arbitrariness and ought not to be regarded as the antithesis of the rule of law. Discretion is necessary and desirable in the interests of efficiency and justice. But in America there is too much unregulated discretion, and too much of it is exercised unpredictably, capriciously and even unlawfully. In some areas free discretion should be superseded or narrowed by legislative rules imposing substantive or procedural duties or laying down clear-cut standards. In others the agency ought to formulate its own "interpretative" rules, in the exercise of its inherent powers, for the information and guidance of the public. In others the formulation of general rules may be impracticable because of the impossibility of predicting the range of situations that may arise in the course of administration; one solution may be for the agency or official to posit a hypothetical set of facts and indicate the answer that would be given if it were to arise. In some contexts (*e.g.* law enforcement) general statements of future policy may be appropriate. In a variety of ways discretionary powers may be so "structured" and the principles governing their application so articulated as to increase the element of predictability and the probability of like being treated alike. Attention is also given to the strengthening of *ex post facto* controls—*e.g.* judicial review, extra-judicial appellate procedures, Ombudsmen.

Many of the problems illustrated are drawn not from the usual areas of administrative law but from criminal law—the "unstructured" discretions exercised by police officers, prosecutors, parole boards, and judges deciding whether to grant bail and what sentence to impose. To devise answers to some of these problems is at least as difficult in this country as in the United States. Favouritism and discrimination by the police in law enforcement are to be deprecated; but a discretion not to prosecute for certain offences in certain circumstances must inevitably be left with the police (*pace* some of the observations in the Court of Appeal in *R.* v. *Metropolitan Police Commissioner, ex p. Blackburn* [1968] 2 Q.B. 118), and it is hard to see how public announcements of the conditions under which they will or will not arrest or prosecute can significantly improve the situation. It may be better to regulate the law of public meeting more closely by legislation than to leave this matter to informal police licensing, but other illustrations do not come readily to mind, and in this country general declarations of intent by chief constables would not be legally binding and might indeed involve a breach of common-law duty to enforce the law. Our law finds it difficult to accommodate the relaxation of a legal rule by administrative dispensation; the legality of some of the *ex gratia* payments extracted by the Parliamentary Commissioner for Administration on behalf of persons aggrieved by maladministration is almost as dubious as the extra-statutory tax concessions made by the revenue authorities (*cf. R.* v. *Customs & Excise Commissioners, ex p. Cook* [1970] 1 W.L.R. 450). Again, the binding force of administrative assurances offered without express statutory authority remains extremely doubtful (*cf. Southend-on-Sea Corporation* v. *Hodgson* (*Wickford*) *Ltd.* [1962] 1 Q.B. 416; *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227; *Att.-Gen. for Ceylon* v. *Silva* [1953] A.C. 461). Even in the United States the strictly legal force of non-statutory "interpretative" rules is unclear; and a "hypothetical" ruling could only be relied on at the citizen's peril, for the agency might readily distinguish the material facts of his case from those in the hypothesis.

It is easy to pick holes in attempts to crystallise principles for the exercise of discretion. Nevertheless, it is very obvious that the public deserves to know more than it has been told in the past. The recent publication of the Immigration Rules and the Supplementary Benefits Handbook is a step in the right direction; one wonders how much of the bulky material not divulged except to persons administering the supplementary benefits scheme and to immigration officers needs to remain secluded from public scrutiny. Why are the Ministry of Technology and the Board of Trade so reticent about the criteria they adopt when making investment grants and issuing or refusing permits and licences? Why cannot the Attorney-General issue a statement of the principles he applies when deciding whether to bring a relator action? How long will it take the Parole Board to evolve and announce a set of principles guiding the exercise of its discretion? Is it impossible for local authorities to issue principles that they propose to follow in specific fields of occupational licensing?

To assert that no serious thought has been given to the "structuring" of free discretion in this country would be untrue; witness the Wilson Report on Immigration Appeals (Cmnd. 3387, 1967) and the Immigration Appeals Act 1969. But a great deal of work still needs to be done by administrators and research workers with a view to eliminating unnecessary discretion and penetrating the mysterious inscrutability of much of the decision-making in British government. Anyone proposing to undertake such a task should place *Discretionary Justice* at the head of his compulsory reading list.

S. A. de Smith.

Congress v. The Supreme Court. By Raoul Berger. [Cambridge, Mass.: Harvard University Press. London: Oxford University Press. 1970. xiii and 424 pp. £7 15s. net.]

This is a large, scholarly, heavily-documented monograph on the origins of judicial review of the constitutionality of legislation in the United States. Whether the framers of the constitution intended that the Supreme Court should have jurisdiction to strike down Acts of Congress incompatible with the Constitution has already been considered at great length by Beard, Corwin, Crosskey and many other constitutional historians and lawyers. The justification for yet another book on this theme must be quality or originality. It is probably too late in the day to be original without being outrageous. Mr. Berger is temperate and meticulous. Drawing on historical sources, including debates in the Federal and State Conventions and other remarks by the participants, and making inferences from the climate of opinion engendered by *Dr. Bonham's Case*, political factors and fears of Congressional oppression, he concludes that it was reasonably plain that judicial review was intended to be part of the constitutional scheme. Why, then, did the founding fathers not say so in the text of the Constitution? Mr. Berger's short answer is that they *did* say so.

> "When the . . . provision that laws made 'pursuant to' this Constitution shall be 'the Supreme Law of the Land' is read in conjunction with the Article III grant of jurisdiction to entertain 'cases . . . arising under this Constitution', it seems plain that courts were authorised to decide that laws which were not pursuant to the Constitution were *not* 'the Supreme Law of the Land'. To the ordinary understanding, a claim that a federal 'law' is not 'pursuant' to the Constitution presents a question 'arising' thereunder" (p. 385).

Such an interpretation of the text seems perfectly reasonable today. Unfortunately, even Mr. Berger is unable to demonstrate conclusively that the "ordinary understanding" was the understanding of a *majority* of the founding fathers. Nowadays, the constitutional jurisdiction of the courts would not be left to be deduced from implications. Indeed, under the Ghana Constitution of 1969, not only is the role of the courts as guardians of the Constitution explicitly stated, but the relevant article of the Constitution is expressed to be unalterable.

Among the other topics considered by Mr. Berger are implied limitations on the constitutional power of Congress to restrict the appellate jurisdiction of the Supreme Court, and the anachronistic and insecurely based doctrine of sovereign immunity in the United States.

The book will not still controversy among the historians, unless perhaps they come to accept that the riddle of constitutional intent simply cannot be finally solved on the basis of the information available. One point made by Mr. Berger is well worth emphasising: Marshall C.J.'s celebrated opinion in *Marbury* v. *Madison*, asserting the power of the court to pronounce Congressional Acts void, was unambiguously foreshadowed by his speech at the Virginia convention fifteen years earlier (p. 140).

S. A. de Smith.

The Costs of Accidents: A Legal and Economic Analysis. By Guido Calabresi. [London: Yale University Press. 1970. 818 pp. 90s.]

In the last few years the writings of Professor Calabresi of Yale Law School have been as interesting as any in the field of tort law with respect to personal injuries. His particular contribution has been to combine the approaches of the lawyer and the economist.

In this book he has for the first time dealt with the law of torts in this way at great length. The method is original and promising. Economic analysis can clearly help tell us whether our accident law accomplishes the goals we seek and perhaps how we should best reform it to meet our demands.

He takes it as axiomatic that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents. There are three sub-goals. First is the reduction of the number and severity of accidents. The second concentrates on reducing the costs to society which result from accidents. Thirdly we should aim at reducing the costs of administering our treatment of accidents.

His plan is then to examine the theoretical basis of the principal methods we have for achieving these sub-goals. This takes him to a review of loss-spreading and the notion that losses should be placed on those with the deepest pockets to meet them. The first way of avoiding the primary costs of accidents which he looks at he calls the general deterrence approach. This is an attempt to decide what the accident costs of activities are and to let the market determine the degree to which, and the ways in which, activities are desired given such costs. Here and elsewhere the rigorous economic analysis is hard going for those who are not trained economists. Then follows an equally difficult account of specific or collective deterrence, which involves deciding collectively the degree to which we want any given activity, who shall participate in it and how we want it done.

The next part of the book examines the fault system at great length in the light of his preceding analysis and discusses whether or not it meets these aims in a satisfactory fashion. He reaches the predictable conclusion that it does not.

All of this is logical, orderly and scholarly. But the reader then has the uneasy feeling that he has only a few pages left to read. Surely the lawyer discovers some answers after many many arduous hours of digesting these first 308 tightly-packed pages. His worst fears are realised. Only six pages are left for the author to tell us what the law of accidents should be. He shirks the task. All this is very disappointing. At the end we feel that we know little that we did not know already. He never examines at length the merits of a combined social welfare cum fines-revocation of licences approach. His concluding paragraph is lame:

> "The real issue of the coming decade will not be the slow battle over the fault system, but rather the quiet war between those who, by pushing various so-called systems of so-called enterprise liability or first- or third-party nonfault insurance, seek to give primacy to primary cost avoidance and some market control over accidents and those who, by urging greater and greater social insurance paid for from general taxes, seek to give primacy to secondary cost avoidance, with perhaps some collective primary cost control attached. The fault system may remain nominally untouched as this war is fought, but it is already clear that the important allocations of accident losses will not be made in accordance with its criteria. How they will be made will depend in any given area of accident law on whether the enterprise liability or social insurance point of view prevails."

Of course Professor Calabresi's work will become important only if and when he is able to carry out that empirical research in the light of his theories which tells us what are the just solutions in the various categories of accidents.

HARRY STREET.

THE LAW OF TORT IN LOCAL GOVERNMENT. Second Edition by MARY BELL CAIRNS, LL.M., PH.D. [London: Shaw & Sons Ltd. 1969. xxxix and 272 pp. inc. index. 84s.]

THIS book lives up to its title. It is a selection of those cases in tort in which local authorities were involved. There are many cases in the book which are not to be found elsewhere. We are given a clear and concise description of the facts and the decision but that is all. There is no analysis, discussion or evaluation of the cases. Thus *Ball* v. *L.C.C.* is summarised without any reference to the criticism of this case in *Riden* v. *Billings*. There is no discussion of the difficulties of reconciling *Dunne* v. *North Western Gas Board* with earlier decisions and *East Suffolk Rivers Catchment Board* v. *Kent* is not subjected to any critical analysis, nor is there any mention of Lord Atkin's dissenting judgment. There is no indication that these last two cases are important policy decisions embodying a particular judicial attitude to public authorities. The Welfare State is referred to only once, which epitomises the narrow legal approach of this book.

It is difficult to see for whom this work is intended. The tort aspects are adequately dealt with in the textbooks on tort, whereas public law questions receive very little discussion. Such problems as whether public authorities should compensate individuals who are injured as a result of the performance of their functions regardless of fault are not ventilated. In the absence of any discussion of such questions there seems to be no more point in collating cases relating to the torts of local authorities than any other class of Her Majesty's subjects.

G. GANZ.

LABOUR LAW. By CHARLES D. DRAKE, M.A., LL.B., of the Middle Temple, Barrister-at-Law. [London: Sweet & Maxwell. 1969. xxiii and 811 pp. (with index). Bound £2 5s. 0d.; Paperback 18s. 0d.]

AMID the rising tide of books on labour law, there has been scarcely any attempt made to provide a simple introductory text for the students of the subject in institutions of higher education until the recent appearance of Mr. Drake's knowledgeable and attractively written work. The author himself will, I am certain, be ready to acknowledge that the first edition of *Labour Law* is not perfect, but the reviewer would like to say that it is undoubtedly the best medium-sized introductory text to this fascinating subject which has yet been published. That said, the following few points of criticism are offered for the author's consideration:

(1) First, references ought really to be cleared out of the text and placed in the footnotes either at the bottom of a page or even, less handily, at the end of a chapter. But to clutter up the text itself with mind-delaying references is really the worst of all three possibilities.

(2) Attention might be drawn to the order in which the author has chosen to deal with the subject-matter of the law relating to collective labour relations. It is impossible to see how he can justify separating analysis of the law relating to collective bargaining and collective agreements from the law governing industrial conflict as well as the legally provided machinery and procedures for the settlement of disputes. All three, collective bargaining, industrial conflict and the role of the "third party" are part and parcel of the same central process in this country through which the terms and conditions of employment are jointly regulated by management on the one hand and, on the other, trade unions and representatives of employees on the "shop floor."

(3) Although much in labour law is based on classical contract and torts, the time has surely come to wrench the issues of labour law away from the classical scheme of the common law and to consider them in their strictly functional context. Thus, one looks in vain in *Drake* for a discussion of, say, the issue of sickness in employment with special reference to its legal aspects, or, again, the profoundly important issue of the law and industrial discipline. Akin to this criticism is a further criticism based at present on something of an idiosyncrasy of the reviewer, namely, that in 1970, as opposed to 1870, labour relations and labour law begin with collective labour relations and job regulation and the law relating thereto. The obsession with beginning an exposition of labour law by attempting to define an "employee" becomes decreasingly comprehensible in this vital area of human and power relations and their containment by legal methods.

(4) Finally, I would say that automatic printing and instantaneous and inexpensive publication cannot come too soon, subject of course to a civilised resolution of the labour relations problems involved. But, at present, it takes so long for a law book finally to appear that in a field which is developing as

rapidly as labour law, a book is inevitably somewhat out of date by the time it gets into its readers' hands. Furthermore, the present economics of book publishing are such as to make any work of over 800 pages a matter of initial doubt and questioning as to whether it could possibly be published at a price which its potential readers might afford. This would appear to have a particularly depressing effect upon works of an introductory character since such works are intended for those with no prior knowledge of the subject and therefore require more rather than less space in which to explain policies and unavoidably complex technicalities. It is only in the world of fantasy and, possibly, television that complex issues and problems can be thought to be capable of being clearly explained in a few well-chosen simple phrases.

CYRIL GRUNFELD.

THE DIVORCE REFORM ACT 1969. By BERNARD PASSINGHAM, O.B.E., T.D. [London: Butterworths. 1970. xii and 58 pp. 25s.]

IF the increase of 9 per cent. per year in the number of divorce petitions filed between 1966 and 1968 continues at this rate, then some 70,000 petitions will be filed in 1971. The beginning of 1971 brings about the commencement of the Divorce Reform Act of 1969, which lays down that the sole ground for divorce "shall be that the marriage has broken down irretrievably."

Bernard Passingham has, in the short time available, provided a concise and skilful review of the Act's history, content and likely consequences. This small book, with the 1969 Act printed as an appendix, goes a long way to meet the needs of "those who have to master the changes from the old law to the new and to those who never knew the law as it was but must strive to understand it as it will be." What is so refreshing is the identification of the social as well as the legal factors and influences that have led to the reform of the divorce laws. Due attention is paid to the likely working of section 2 of the Act and what the author terms the five "guide lines" that will enable the court to determine whether or not irretrievable breakdown exists. Especially useful, in the chapter dealing with the new bars to divorce, is the distinction made between the provisions of sections 4 and 6 of the Act concerning unsatisfactory or non-existent maintenance arrangements as possible defences to the making of the decree absolute. The author notes that divorce reform cannot alter the fact that the ordinary working man seldom has the means to support two families at the same time.

Half the broken marriages dealt with by magistrates proceed to the divorce court. Though the legal fiction of "innocence" and "guilt" have been removed from the divorce courts, the matrimonial offence will remain as the basis for the magistrates' matrimonial jurisdiction. Passingham observes, "insistence throughout upon matrimonial offences will have engendered that very bitterness and ill-feeling which the Divorce Reform Act 1969 is designed to avoid, and if it is clear that there is no reasonable chance of reconciliation, and considerations of maintenance are not too pressing, the proper advice would seem to be to avoid this strife-ridden staging post and proceed forthwith to proceedings for divorce."

The concluding chapter attempts to foresee the practical working and interpretation of the 1969 Act; though rightly emphasising the uncertainty resulting from the unknown final format of the Matrimonial Proceedings and Property Bill. The author concludes, "The success or failure of the Act will ultimately rest in the hands of the legal profession in persuading, and in educating, their clients to acceptance of what should be a valuable measure of law reform." Surely the role of the judge will be the most important of all in the success or failure of the Act?

This is a book that will prove to be a very useful compact reference for the legal profession, academics and students of family law.

C. GIBSON.

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RECENT LEGISLATION ON MATRIMONIAL PROPERTY [*]

I

THOSE interested in the reform of matrimonial property law have the occasion this year of celebrating an important centenary: it was in 1870 that Parliament passed the first Married Women's Property Act. The Act—following in the wake of John Stuart Mill's pamphlet on the Subjection of Women published in 1869—was a limited measure: it was mainly—though not exclusively—concerned with a woman's own "wages and earnings," [1] and it was destined to be short lived. In 1882 it was replaced by the Married Women's Property Act of that year, a more far-reaching and a more determined step in the reform of matrimonial property law.

Nevertheless the statute of 1870 is important, not only as a piece of legal history, but also for its symptomatic significance. At the time when it was passed nobody in this country considered as yet the problem of the effect of marriage on property in its entirety. What was going to happen to the husband's property was not yet seen as a subject of legislation at all, neither was the general problem of who should own what the spouses acquired during marriage through their joint efforts. Legislation was considered principally as a means of protecting against the effect of the common law those married women who were gainfully employed or enjoying some inherited wealth.[2] In short, no one even reflected upon the effect of marriage on property in terms of a systematic approach, of a *régime matrimonial* such as had been part of the living law across the Channel for centuries and was codified in the Code Napoléon.[3] And the idea that a share in the property acquired by or destined to the use of the family was due to a woman in view of her work or her thrift was nowhere near the horizon a century ago. Today this is one of the central problems of matrimonial property law.

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[*] The author is very grateful to Mr. Stephen M. Cretney of Exeter College, Oxford, who read a draft manuscript and saved the author from a number of mistakes.

[1] "The wages and earnings of any married woman acquired or gained by her. . . in any employment, occupation or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired through the exercise of any literary, artistic, or scientific skill, and all investment of such wages, earnings, money or property" (s. 1). The reference to literary, artistic and scientific skills is a reminder of the decisive role played in the agitation for the reform of the law by professional women, artists and writers. This was the generation of George Eliot.

[2] See s. 7 of the 1870 Act. Those with more than a modicum of inherited wealth were normally protected by marriage settlements.

Much has happened since the passing of the Married Women's Property Act of 1882[4] and by far the most important series of events was the sequence of statutes regulating the law of intestacy[5] which revolutionised the principles governing the financial position of the widow or widower in the event of the other spouse having died intestate. Under the present law it is only in exceptional cases of comparatively large estates that, upon an intestacy, the surviving spouse does not inherit everything.[6] Whether this is a good thing or a bad thing—there is a case for saying that the law gives insufficient protection to the children of a marriage which has collapsed—it overshadows the intensive discussion on the future of matrimonial property law which is now developing in this country,[7] and no comparison of the matrimonial property law of this country with that of any foreign country has any value unless the law of intestacy and the law of "provision" for the family out of the estate in defiance of an adverse will are constantly borne in mind. Seen in a comparative context, the English law of succession is characterised not only by the generosity with which it treats the surviving spouse in the event of intestacy but also by its reluctance to give her or him adequate protection in the event of the exercise by the predeceasing spouse of his or her freedom of testation in a manner adverse to the interests of his or her spouse and children.[8] The reform of the law of family provision will have to be an integral element in the reform of the law of family property. This may have to lead to far-reaching restrictions of the freedom of testation. It will not be discussed in the present article which will be restricted to *inter vivos* problems, and touch the situation arising on death only indirectly.

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[3] Book III, Title V: "Du contrat de mariage et des droits respectifs des époux." This Title comprised 195 articles. By the law of July 13, 1965 (in force since February 1, 1966) it was replaced by a new Title: "Du contrat de mariage et des régimes matrimoniaux" which must be read in the light of the new fundamental provisions in Arts. 214–226. The new legislation is shorter; whether the law has been simplified is another question.

[4] In *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966, 980 B Lord Morris of Borth-y-Gest mentioned and to some extent described the "pattern . . . which reflects social conditions which differ from those in earlier decades" and which appeared in so many of the cases under s. 17 decided in the lower courts since *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 (C.A.).

[5] Beginning with the Intestates' Estates Act 1890. The modern law dates from s. 46 of the Administration of Estates Act 1925, which is in force in the form of the First Schedule to the Intestates' Act 1952, as amended by s. 1 of the Family Provision Act 1966.

[6] In the absence of issue and of parents, brothers and sisters of the whole blood and their issue the surviving spouse gets all. If there is issue, the surviving spouse gets the "personal chattels," £8,750 (or such larger amount as the Lord Chancellor may fix from time to time) free of death duties and costs, and a life interest in half the residue. If there is *no* issue but a parent or a brother or sister of the whole blood, she gets £30,000 (or such larger amount as the Lord Chancellor may fix from time to time), free of death duties and costs, the personal chattels, and half the residue absolutely.

[7] It is understood that at the time of writing the Law Commission has made considerable progress with the draft of a working paper on Family Property Law which is to cover the problems of the matrimonial home, family provision and legal rights of inheritance, and the general question of community of property.

It stands to reason that the unwillingness of the legislature to restrict the freedom of testation gives added strength to demands for the introduction of a system of community of property which, upon the death of either spouse, automatically reserves a predetermined proportion of the joint assets of the spouses to the survivor (as it does in France).[9] Consequently, those who are opposed to the introduction of a community system are compelled to reflect upon a radically improved scheme of family provision. On the other hand, however, the structure of the English law of intestacy reduces the strength of the case for a community system and indeed diminishes the importance of comparisons between the law of this country and that of "community" countries. Where the rights of the surviving spouse in the event of intestacy are very limited (as they were in Western Germany until 1958 [10] and as they still are in France),[11] the distribution of the assets between the spouses must be a matter of vital importance in the normal case of the termination of marriage by the death of one of the spouses. It is partly due to the law of intestacy that in this country the discussion on matrimonial property law (inside and outside the courts) can be, and is being conducted so largely in terms of divorce, annulment and judicial separation, and of marriage breakdown in general.

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[8] Even in the form they have now received by Sched. 3 to the Family Provision Act 1966, the Inheritance (Family Provision) Act 1938 and ss. 26–28A of the Matrimonial Causes Act 1965, remain provisions for a right to maintenance and do not give to the surviving spouse any right to a fixed sum or proportion of the estate.

[9] Code Civil, Art. 1475 (in the form of the law of July 13, 1965).

[10] BGB, para. 1931: to take the most important example: one-quarter of the estate where there was issue. But under the law of 1957 the surviving spouse now gets a further quarter of the estate to account for her or his share in the *Zugewinn* or matrimonial acquests. This however is by virtue of matrimonial and not by virtue of successoral right with the not unimportant consequence that the second quarter is not subject to legacy duty. The very complicated position is succinctly explained in Beitzke, *Familienrecht* (15th ed., 1970), pp. 88 *et seq.*

[11] Art. 767 C.C. Only a usufruct in one-quarter of the estate if there is legitimate issue. This is the result of an amendment of the Code of 1925. Since this usufruct can, at the option of the heirs, be converted into a life annuity (*rente viagère*) one can say, with some justification, that where there is issue, French law treats the surviving spouse in the event of intestacy, in the way English law treats him or her in the event of disinheritance, with the vital differences that the French right is fixed by law and is not discretionary and that it must be seen in conjunction with the matrimonial community right.

This, however, does not detract from the fundamental social importance of the problem, and the history of legislation in the course of the last forty years shows that Parliament is alive to this. The corpus of the relevant measures can be divided into two groups: some were designed to clear away old débris, to remove outdated vestiges of the pre-1882 situation and to give full effect to the principle of separation of property of husband and wife: the Law Reform (Married Women and Tortfeasors) Act 1935,[12] and the Married Women (Restraint upon Anticipation) Act 1949,[13] belonged to this category of legislation and so did the Law Reform (Husband and Wife) Act 1962 which removed the anomalous rule that husband and wife could not be mutually liable in tort,[14] and section 30 of the Theft Act 1968, which removed the rule that they could not be criminally liable for stealing one another's property.[15] Other statutes, however, were constructive. They sought to mitigate the rigour of the principle of separation of property, and to give legal expression to that factual community of use and enjoyment of property which (whatever the law may say) is a necessary element of family life. One important but quite inadequate measure of this kind referred to household money: this was the Married Women's Property Act 1964.[16] Two far more fundamental steps in this direction were taken more recently with the passing of the Matrimonial Homes Act of 1967, and, in a very different way, with that of the Matrimonial Property and Proceedings Act of 1970.[17] The present article will be mainly concerned with these two statutes.

However important and beneficial, all this legislation is patchwork, a series of responses to the needs of the moment. The problem of matrimonial property has never been tackled systematically, the way it was tackled—with debatable success—in Germany in

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[12] As pointed out in a previous article in (1952) 15 M.L.R. 133 *et seq.*, this statute was the first to give clear expression to the principles of equality of status and capacity, of separation of property, and of separation of liabilities.

[13] Abolishing still existing restraints.

[14] Subject, however, to important qualifications designed to prevent tort proceedings being used to ventilate matrimonial quarrels, and also to allow s. 17 of the Married Women's Property Act 1882 not to be displaced by proceedings in tort.

[15] Proceedings for stealing or unlawfully damaging his or her spouse's property cannot, however, be instituted against a person except with the consent of the Director of Public Prosecutions. This does not apply if the spouses were judicially separated at the time of the offence. s. 30 (4).

[16] This lays down that, in the absence of an agreement to the contrary, money saved from or property acquired with the means of the household allowance is jointly owned. The Act does remove the "injustice" discussed in (1953) 16 M.L.R. 85 *et seq.*, but it is a lopsided measure because it rewards the housewife's thrift if she has been able to make savings from what the husband gave her, but not if he was able to make the savings because, knowing her to be thrifty, he was able to pay her less for household expenses. This is one of those scraps of reform which can only be justified as pace makers for more systematic measures.

[17] Henceforth referred to for brevity as "the Act of 1970" or the "1970 Act."

1957[18] and in France in 1965[19] and as, with regard to maintenance obligations, it has now been tackled in this country by the Act of 1970.

The case for a systematic regulation of the effect of marriage on the property of the spouses rests on the same economic and social developments which are the background of the legislation presently to be discussed. Its urgency has been reinforced by the recent decisions of the House of Lords in *Pettitt* v. *Pettitt*[20] and in *Gissing* v. *Gissing*[21] which have demonstrated the fragmentary nature of such discretionary powers as the courts now enjoy to adjust the law to these transformations in its social background.

II

When Parliament passed the Married Women's Property Act 1870 it was concerned with the alleviation of the hardships so eloquently demonstrated by John Stuart Mill: these hardships arose from the time lag between social and legal developments: the medieval common law (which still applied to the vast majority of the people) took no account of the needs of married women who were gainfully employed outside the house, and who through their own earnings contributed to the maintenance of the family, and equity protected only that minority of women who enjoyed the benefit of marriage settlements or of inherited property given to them for their separate use. With some exaggeration it may be said that the nineteenth century matrimonial property legislation was mainly the result of the spread of gainful occupation outside the home among a large number of married women as a result of the industrial revolution and of the disappearance of the household as a unit of production. The Married Women's Property legislation of a century ago was a response to a revolution in production, the crisis of today is and the legislation which will have to emerge from it will be a response to a no less revolutionary transformation in consumption. It is the change in the distribution of durable assets intended for use and enjoyment and the corresponding change in modes of consumption which has led to a new time lag between social and legal developments. In legal terms the constitutional problem has arisen whether the courts are called upon, are able and are willing to adjust the law to the new situation, or whether this is a matter for the legislature.

The acquisition for family use of durable assets, immovable and movable, is one of the dominant features of economic life in the Western world. In many families in the upper layers of the working class and in the middle classes a large proportion of the joint family income is earmarked for the acquisition of such assets through instalment purchases and instalment mortgages. Very often such acquisition is made possible through much improved facilities for married women to participate in gainful employment, owing to the state of the labour market, owing to family planning, and also owing to that mechanisation of the household which is in its turn the result of the ability of the family to use part of its current income towards the acquisition of durable assets. But the number of households which acquire the matrimonial home and its contents and accessories out of current income far exceeds the number of those in which both spouses participate in earning it through gainful occupations. Mrs. X may, by her thrift as a housewife, contribute as much to the acquisition of the matrimonial home or of the family car or the television set as her neighbour Mrs. Y does by working in a factory or in an office. The maintenance obligation which the law imposes on the husband used to be considered as an answer to the question raised by the economic dependence of wives upon husbands which results from the arrangements of nature rather than from those of society. As a housewife and as a mother the wife was " rewarded " in this way. This approach to the problem had a certain plausibility as long as the large majority of married couples were compelled to spend their income on current needs of food, clothing and shelter for themselves and their children. The link between the law of matrimonial property and the law of matrimonial maintenance is as close today as ever it was, but how can one seriously assert that the supply by the husband of the means to cover these elementary needs can be an equivalent to the wife's economic contribution (in whatever form) where a large part of the contribution is destined for the acquisition of durable goods, and especially of a home for the family?

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[18] Law of June 18, 1957.
[19] Law of July 13, 1965.
[20] [1969] 2 W.L.R. 966.
[21] [1970] 3 W.L.R. 255.

In the nineteenth century it may have been possible to draw a line between the minority who owned capital assets and the majority who lived on their earnings and had no, or practically no savings. It may have been possible to say that, for the minority, the problem of matrimonial property was mainly how to allocate investments, *i.e.* (if a tentative definition be permitted) of assets acquired with a view to the income they were expected to yield or to the appreciation of their capital value expected to be realised on sale. The majority, however, had no real matrimonial property problems and their difficulties were crudely and inadequately solved through the law of matrimonial maintenance, and later of social security, and also through legislation which (this was very much true of the 1870 Act) was primarily directed towards protecting the wife against the appropriation by the husband of such current cash income as she was able to earn. The mass distribution of durable consumer goods has changed all that. Today the problem of sharing between the spouses and of the protection of the non-earning housewife (which is part of it) can no longer be solved through the law of maintenance. It must comprise her share in what has been called " household property" or "family assets."[22] Much the most important of these is the family home, whether it be freehold or rented property. This is the reason why today the matrimonial home dominates the discussion. It is also the reason why, whether we like it or not, we have to face the difference between household or family assets and investment property as a distinction of social types which may conceivably have to be translated into legal terms, however difficult may be the task this imposes upon the draftsman. The social need we are confronting is mainly about family assets, although experience has shown that this is not invariably so.[23] As pointed out, nineteenth-century legislation just did not have to face this problem—the only trace of its existence can possibly be seen in one ambiguous provision which seemed to give the court a discretion in the distribution of family assets. That was the famous section 17 of the Married Women's Property Act 1882 which originated in section 9 of the Act of 1870.[24] It is no coincidence that our present discontents have largely arisen from the inability of the courts to speak with one voice on the meaning of this statutory provision which has now become the focal point of the discussion in practice, and which through the decision of the House of Lords in *Pettitt* v. *Pettitt* has lost such potency for adjusting the law to modern social conditions as at one time it seemed to have.[25]

III

What has Parliament done to adjust the law of matrimonial property to the social situation briefly sketched above? What exceptions have been created to the norm of separation of property, laid down in the Married Women's Property Act of 1882 and the Law Reform (Married Women and Tortfeasors) Act 1935, and, more recently, emphasised by the Law Reform (Husband and Wife) Act 1962, and by the Theft Act 1968? The separation norm means that in all matters of property marriage has no effect on the relationship between the spouses or on their relationship to third persons.[26] That this norm has never been without exceptions, indeed that its unqualified application between husband and wife would be simply incompatible with the legal and social institution of marriage, is a common place and needs no elaboration. There has never been any doubt that, by virtue of the marriage, either spouse has the right to use and occupy the matrimonial home, and that the extent of this right depends on criteria of a purely " matrimonial " character (conduct of the spouse, interest of both and of the children, etc.) and has always been quite independent from the nature of the proprietary interests of husband and wife.[27] This was reaffirmed as a principle of the common law which has survived all legislation in one of the most recent decisions of the Court of Appeal on this topic.[28]

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[22] The term "family assets" is here used to denote items of property which, by consent of the spouses, are dedicated to the present or future common use of the family—a definition similar to, but not identical with those used by Lord Diplock in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966, 994, and by Lord Denning in *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676, 1680, and different from that used by Lord Morris of Borth-y-Gest in *Pettitt* v. *Pettitt* at p. 978. Lord Hodson (at p. 987) and Lord Upjohn (at p. 993) deprecated the use of the term *de lege lata*, but Lord Hodson seemed to think it might be helpful *de lege ferenda*. For a discussion of the possible meanings of "family assets" see Miller, "Family Assets" (1970) 86 L.Q.R. 98, 106 *et seq.*

[23] See *e.g.* the facts in *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676 (C.A.).

[24] On the link between the two statutes see esp. Lord Morris of Borth-y-Gest in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966, at pp. 974 *et seq.* and Lord Upjohn, *ibid.* at pp. 988 *et seq.*

[25] But see the view of Lord Denning M.R. expressed in *Nixon* v. *Nixon*, *supra*, note 23.

[26] See esp. Lord Upjohn in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. at p. 989.

In order to see the exceptions to the separation norm which have resulted from the recent development of legislation in a systematic context, it is useful to remind oneself that the word " property " and even the more precise word " ownership " denotes a bundle of rights or powers. For the present purposes one may distinguish rights or powers to use an asset, rights or powers to control or appropriate the economic substance of an asset, and rights or powers to dispose of an asset in relation to third persons.

The effect of marriage on the property of the spouses may be and is in fact quite different as regards rights of enjoyment, rights of participation in capital values, and " title." Much of the confusion surrounding the subject (here and abroad) has been caused by a failure to distinguish the domestic or " internal " relationship between the spouses, and the obligations they owe one another with regard to both the use of and the income derived from property and to the distribution of the substance or value, from the " external " relationship, that is the allocation of the power of disposal which the spouses or either spouse have as against outsiders, and the position of outsiders towards the property. The distinction between the internal relationship (both as regards use and as regards capital) and the external relationship (" title ") is vital *de lege lata* as well as *de lege ferenda*. If one considers how much of the existing property and conveyancing legislation in this country consists of an attempt to translate the distinction between internal and external relations into rules applicable in practice, it is surprising that it has so often been blurred in the discussion of matrimonial problems. It will also have to be realised that this distinction is very closely linked with the, as it were, constitutional issue as to who is called upon to create exceptions to the separation norm, *i.e.* whether this is or should be within the scope of the legislative or of the judicial power. It is the function of the legislature to create general norms, and it is the function of the judiciary to decide cases in the light of their facts. This distinction does not coincide, but it is closely linked with the problem of the " generality " of rules: are the exceptions to the separation norm formulated or to be formulated in terms of abstract norms, or in the light of individual facts, *i.e.* according to the " discretion " of the decision-makers? The scope of judicial discretion may have to differ very much according as to whether the problems in issue are problems of use, or distribution of capital or of title. This, in this writer's opinion, is *de lege ferenda*, an important point.

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[27] See *e.g. Gorulnick* v. *Gorulnick* [1958] P. 47 (C.A.).

[28] See *Gurasz* v. *Gurasz* [1969] 3 W.L.R. 482, discussed below.

The principal characteristic of English law in the field of matrimonial property is that such exceptions as have been grafted on the general norm of separation of property, have so far been concerned either with individual items of property, such as the matrimonial home, or specific situations of the spouses, such as marriage breakdown, but not with their property, or types of property (" acquests," family assets, etc.) as a whole.[29] This is an important difference between English law and, *e.g.*, German or Scandinavian law, especially important now in view of the ruling of the House of Lords that section 17 of the 1882 Act does not create a general discretionary exception to the separation norm in the internal relationship as regards the right of capital enjoyment.

In considering the present state of legislation it may be helpful to bear in mind the social background as well as some such conceptual framework as the one tentatively sketched above. It will be necessary to deal with the problems which surround the use of the matrimonial home and subsequently with the effect of marriage breakdown on the property relationship.

IV

In 1965 the House of Lords decided in *National Provincial Bank* v. *Ainsworth*[30] the battle which, since the case of *Bendall* v. *McWhirter*[31] in 1952, had been waged between the conveyancers and the family lawyers inside and outside the courts.[32] It drew that sharp line between internal and external relations which had been blurred through the invention of such notions as the " equity " of the deserted wife, or the irrevocable licence which enabled her to assert a right to occupy the matrimonial home even against outsiders, such as purchasers, landlords and mortgagees and other creditors, as well as trustees in bankruptcy. The mutual rights of the spouses were not affected by the decision in the *Ainsworth* case, but it was established that the right which by virtue of marriage a spouse has to occupy the matrimonial home is a *jus in personam* and no more. Third parties were concerned with the legal title vested in either spouse or in both jointly, and not concerned with the right of enjoyment by occupation which the spouses shared in their capacity as spouses. The one exception to this principle is that of the "sham" transaction, such as *Ferris* v. *Weaven*,[33] where, to quote Megarry J., the "documents lied," the purchaser's ownership was a "mere pretence," and the husband (who tried to get his wife out through this shady device) had in "substance and reality" remained the owner[34]—a necessarily rare exception as the recent case of *Miles* v. *Bull*[35] clearly shows.[36]

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[29] In its Report on Financial Provision in Matrimonial Proceedings (No. 25, July 1969) the Law Commission disclaimed any intention to " attempt a root and branch reform of family property " which will have to await the forthcoming Report on Matrimonial Property.

[30] [1965] A.C. 1175.

[31] [1952] 2 Q.B. 466 (C.A.).

[32] See the present writer's article in Friedmann, *Matrimonial Property Law*, p. 299.

The width of the gap opened by the *Ainsworth* case is illustrated by this very fact that the common law cannot protect the spouse's right of occupation against a third party even if that party is *mala fide*, *i.e.*, if he knows that, in conferring title to him, the spouse who has the legal title pursues the "ulterior purpose" of evicting the spouse in occupation. Here a remedy recommended by the Morton Commission[37] was readily available: to use the existing machinery of publicity through registration under the Land Charges Act and the Land Registration Act in order to transpose the spouse's right of occupation into the external sphere. But this is a remedy which only the legislature can use.

The Matrimonial Homes Act 1967[38] was the necessary answer to the decision in the *Ainsworth* case. It does three things:

It codifies[39]—in an imperfect manner—the matrimonial right to occupy the home.[40] This is a matter concerning the internal relation between the spouses, and subject to the widest possible discretion of the court.

It lays down that the right of occupation is a charge on the estate or interest of the spouse who has the legal title and makes this charge registrable under the Land Charges Act or the Land Registration Act.[41] It thus uses the machinery of publicity in order to transform the internal right of enjoyment into a modification of title.

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[33] [1952] 2 All E.R. 233, considered as correctly decided by Lord Hodson and Lord Wilberforce in *National Provincial Bank* v. *Ainsworth*, *supra*, at pp. 1223 and 1257 *et seq.* but treated with reservation by Lord Upjohn at p. 1240.

[34] [1968] 3 All E.R. at p. 636.

[35] No. 1: [1969] 1 Q.B. 258; [1968] 3 All E.R. 632 (Megarry J.); No. 2: [1969] 3 All E.R. 1585 (Bridge J.).

[36] The subject of "simulation" and "dissimulation" in the law of contract is much in need of further exploration.

[37] Report of the Royal Commission on Marriage and Divorce (Cmd. 9678, 1956), para. 671, Rec. 78 (b).

[38] For previous discussion of the Act see a Note by Dr. O. M. Stone in (1968) 31 M.L.R. 305. Dr. Stone shows that the Act is obviously defective in a number of directions especially in its failure to protect the children.

[39] As Dr. Stone says (p. 306) it is "in fact a legislative restatement of the traditional common law duty of consortium."

[40] *i.e.*, "a" (not "the") dwelling-house which is or has at any time been a matrimonial home of the spouses. For further definition see s. 1 (7) and (8). In the internal relation the right of occupation may cover two or more houses, but only one charge may be registered, *i.e.*, against strangers only one right of occupation can be claimed (s. 3).

[41] s. 2 (1), (6), and (7).

As regards rented property subject to the Rent Act, it enables the court to transfer the tenancy [42] or the right of occupation by virtue of a statutory tenancy to the tenant's spouse,[43] but this can only be done in divorce and nullity proceedings after decree nisi so as to take effect after decree absolute.[44] This too is a modification of title, projecting the after-effect of the former household community into the situation after the final break-up of the marriage, but since it operates in both the external and internal sphere it requires an order of the court.

The first two features of the Act require some comment:

(a) The right of occupation created by the Act is a matrimonial right and comes into being on marriage or on the acquisition of the property (whichever the later)—in view of the pre-*Ainsworth* case law it is noteworthy that it is based on marriage and not on its collapse or on a " matrimonial offence " such as the desertion of the wife in the matrimonial home.[45] It ends automatically [46] when the marriage is terminated by death or divorce (or when the property is disposed of). The court can however " in the event of a matrimonial dispute or estrangement " (and only then) direct that the right of occupation is to continue after the death of the other spouse or after divorce.[47] Here and here only is the fact of marriage breakdown made expressly relevant under the Act. That a surviving spouse can only be protected if she or he was estranged from the deceased during his or her lifetime is odd, but the point is academic because few spouses are likely to disinherit the other spouse if they live in harmony.

The right is a right of both spouses, not only of the wife—this too shows the superiority of the codification compared with the previous case law which left this matter in doubt, but in one respect the codification is defective. The statutory right of occupation is given only to a spouse who is not entitled to occupy the home " by virtue of any estate or interest or contract or by virtue of any enactment." [48] A spouse who is *e.g.* a joint owner or tenant is of course also entitled to occupy the home, and the Act was certainly not intended to take this right away.[49] That the matrimonial rights codified in the Act are merely supplementary to the proprietary rights of occupation based on the common law may seem to be merely inelegant: After all many decided cases show that internally, between the spouses, the exercise of proprietary rights is overlaid by matrimonial considerations.[50] Nevertheless, this supplementary or fragmentary nature of the codification has already led to serious inconveniences: Thus the special procedure provided so as to enable a spouse to enforce his right of occupation is only available where his right of occupation is based on the statute, and not on the applicant's own proprietary rights.[51] Moreover, where both spouses have a proprietary interest and the marriage collapses, it may be difficult to delay a sale insisted upon by one of them.[52] In the "external" sphere, however, this defect of the Act has already led to an amendment: if a spouse's proprietary right to occupy rests on an equitable interest alone, it is defeated by a conveyance of the legal estate to a bona fide purchaser,[53] but, not being a statutory right, it was not, as the Act originally stood, registrable under the Act either. It has now been made registrable by an amending provision of the 1970 Act,[54] a matter of special importance for a spouse who, through contributions to the purchase price or (now) [55] to improvements has acquired an equitable interest in a house owned by the other.[56]

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[42] s. 7 (2).

[43] s. 7 (3). By s. 7 (4) the court may both in the case of s. 7 (2) and in that of s. 7 (3) direct that the spouses shall be jointly and severally liable for arrears of rent which have accrued before decree absolute. The liability for rent after that date is transferred to the transferee.

[44] Before decree absolute the spouse of a tenant under the Rent Act is protected against surrender of the tenancy by s. 1 (5). See below.

[45] See s. 2 (1): The priority of the charge on the other spouse's estate or interest dates from the acquisition of the estate or interest, the marriage or the commencement of the Act, whichever the latest. Common law rights of occupation based on a property interest must obviously date from the acquisition of the right. Whilst the existence of a " matrimonial dispute or estrangement " is thus irrelevant for the existence of the right or for the time of its inception, it may be relevant to its termination (s. 2 (2)).

[46] s. 2 (2). A charge registered under the Land Charges Act or the Land Registration Act must in this event be cancelled. For the procedure see s. 5.

[47] s. 2 (2). In that event the charge also continues.

[48] s. 1 (1).

The most serious shortcoming resulting from the technique of supplementary codification is that a spouse whose right of occupation is proprietary cannot be turned out of the house unless the other spouse proves that his presence would expose him (more normally her) to molestation.[57] Under the Act the court can "regulate" but not "terminate" the owning spouse's right to occupy.[58]

Otherwise the enforcement provisions of the statute are a great improvement on the previous law: the statutory right is not only a *jus retinendi* ("not to be evicted") but also a *jus recuperandi* ("to enter into and occupy"), but whilst the former operates automatically, the latter can only be exercised with the leave of the court.[59] Even the spouse in occupation may however need a court order, not only, as the statute says, with a view to " declaring, enforcing, restricting, or terminating " her or his rights of occupation or of regulating their exercise, but also so as to regulate the exercise of the other spouse's proprietary " right to occupy." [60]

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[49] See Lord Denning M.R. in *Gurasz* v. *Gurasz* [1969] 3 W.L.R. 482 (C.A.); [1969] 3 All E.R. 822, 824 *et seq.*

[50] See *e.g.* the leading case of *Gorulnick* v. *Gorulnick* [1958] P. 47 (C.A.). There are of course many other examples.

[51] *Gurasz* v. *Gurasz*, *supra*—the words "rights of occupation" must have the same meaning in s. 1 (1) and in s. 1 (2).

[52] This important point is made by Evans and Roberts in (1968) 31 M.L.R. 567, note 25.

[53] See *Caunce* v. *Caunce* [1969] 1 W.L.R. 286.

[54] s. 38, adding a new section 1 (9) to the Matrimonial Homes Act 1967.

[55] s. 37 of the 1970 Act.

[56] See Law Commission Report No. 25, paras. 59, 68 (b).

[57] *Maynard* v. *Maynard* [1969] P. 88.

[58] s. 1 (2). One would hope that a court might be bold enough to adopt the interpretation suggested by Dr. Stone, *loc. cit.* p. 308, but it is unlikely.

In this procedure the court has far-reaching powers.[61] It may make any order it thinks just and reasonable (or may refuse to make any order), limit the scope of its order to part of the premises (*e.g.* so as to exclude a part of the premises used for professional or business purposes), compel either spouse (not only the one claiming under the Act) to make " periodical payments " to the other (is this " rent " and is it taxable under Schedule D of the Income Tax Act?) or to look after the repair or maintenance of the premises, or to pay rent, rates, mortgage interest and other " liabilities in respect of the dwelling house," and, now as before the Act, it may (though not under the Act) by an injunction restrain the spouse owning the house from disposing of it so as to deprive the other of her or his occupation.[62] All this it may do at its discretion permanently or for a stated period or until further order.[63] The lines of guidance which the Act gives to the court for the exercise of this discretion show that this is a matrimonial right. The matrimonial conduct of the parties, their means and needs, and—paramountly one hopes—the interests of the children must be considered, quite apart from " other circumstances " such as presumably whether there is another matrimonial home and what are the prospects of finding alternative accommodation.[64]

(b) Whilst thus, in the internal sphere, the Act has expanded and systematised the right of occupation by virtue of marriage which the courts had established in a fragmentary way before the Act, the statute has, through transforming the right of occupation into a registrable charge, not only shown that the two spheres must be separated, but also how it can be done. The machinery of registration differs of course according to whether the land is registered or not[65]—the conveyancing techniques are not germane to this article—the essence of the matter is that, when registered, the charge constituted by the spouse's statutory right of occupation binds the owning spouse's successors in title, mortgagees, etc. and as between each of them and the spouse who has the statutory right of occupation, the discretionary and regulatory powers of the court are exercised as they are between the spouses.[66] However, neither a trustee in bankruptcy nor a trustee for the benefit of creditors under a conveyance or assignment of property nor the personal representative in the event of the estate being insolvent are bound by the charge[67]—and this is probably right. It is however, in a sense, an irony of history, if one considers the facts of *Bendall* v. *McWhirter*,[68] the case which started the development many years ago and which was overruled by the House of Lords in *Ainsworth*.

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[59] s. 1 (1) (*a*) and (b), a point rightly emphasised by Dr. Stone, *loc. cit.* p. 306. A spouse in occupation can be neither evicted nor " excluded " without the leave of the court, *i.e.* exclusion does not terminate occupation. If the husband locks the wife out while she is out shopping or has the lock changed against her while she is on a three-day-visit to her parents, can she enforce entry without a court order? The puzzle created by the words " or excluded " is by no means academic.

[60] s. 1 (2). To regulate but not to terminate (see above). The absurdity of this (see *Maynard* v. *Maynard*, *supra*) is heightened by the fact that, where rent controlled premises are involved this is exactly what can be done under s. 7 with effect after decree absolute, but not before.

[61] s. 1 (3).

[62] *Lee* v. *Lee* [1952] 2 Q.B. 489 (C.A.); *Halden* v. *Halden* [1966] 1 W.L.R. 1481. Lord Denning M.R. and Russell L.J. (at p. 1484) made it clear that *Lee* v. *Lee* had survived *Ainsworth*.

[63] s. 1 (4). This may obviate the need for an adjournment—an important point. These cases are likely to be urgent. See Lord Denning in *Baynham* v. *Baynham* [1968] 1 W.L.R. 1890, 1895.

[64] s. 1 (3).

How much good will these registration provisions do to those who need them most: the deserted wives who belong to the working and lower middle classes and who are neither accustomed nor financially able to consult solicitors? How many will know about this possibility and understand it? As was recently pointed out,[69] the Act does not even compel a husband who wants to sell or mortgage the house to notify the wife who is in occupation. Ideally a charge should be registered on marriage[70] or at least at the first sign of its collapse. Obviously this is not going to happen because the people concerned do not know their rights and have no one to tell them, and if it were to happen, the Registers would probably be swamped and the statute amended.

There is however one right against third parties which the Act gives to the occupying spouse without any prior registration, and this, as the Morton Commission[71] saw, may be of cardinal importance. It is the right to take those measures of self-help which are needed to ward off the danger of eviction by third parties, that is to discharge the other spouse's liability to pay rent, rates and mortgage interest. This was not possible before the Act, but now, without any order of the court, any "payment or tender or other thing done" by the spouse in occupation "in or towards satisfaction of any liability of the other spouse in respect of rent, rates, mortgage payments or other outgoings affecting the dwelling house" is "as good as if made by the other spouse" and the payment discharges the debt.[72] If the right of occupation is registered, a mortgagee must join the occupying spouse in any proceedings for possession so as to give her a chance of avoiding eviction by discharging outstanding liabilities.[73] The right of recourse between the spouses is not of course affected nor is the acquisition of an equitable interest in such property by virtue of such payments.[74]

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[65] Compare s. 2 (6) and s. 2 (7).

[66] s. 2 (8).

[67] s. 2 (5).

[68] *Bendall* v. *McWhirter* [1952] 2 Q.B. 466 (C.A.).

[69] By Megarry J. in *Miles* v. *Bull* (*No.* 1) [1968] 3 All E.R. 632, 634 *et seq.*

[70] As Dr. O. M. Stone suggests (*loc. cit.*, c. p. 308).

[71] See Cmd. 9678, para. 677.

[72] s. 1 (5).

[73] *Hastings and Thanet Building Society* v. *Goddard* [1970] 2 All E.R. 737.

What is equally important is that occupation by the spouse who is entitled thereto under the Act is for Rent Act purposes equivalent to occupation by the tenant: this codifies and enlarges the law as laid down by the courts before the Act in *Brown* v. *Draper* [75] and similar cases.[76] No more conspiratorial surrender of keys to the landlord in order to evict a deserted wife—here and also in relation to the possibility of the transfer of tenancy rights after divorce [77] it becomes clear that the statutory protection of tenants under the Rent Act has been used for the matrimonial protection of the tenant's wife (or husband): no corresponding provision was or could perhaps have been made for unprotected tenancies.

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The Act of 1967 deals with only one type of asset: not a word can be found in the Matrimonial Homes Act about the contents of the home; it does not even protect a deserted wife against removal of the furniture by the absconding husband. On the other hand its operation is not expressly confined to situations of marriage breakdown, but most (not all) of its provisions are directed towards a state of matrimonial or financial crisis. Exceptions apart (the most important being the provision for the transfer of Rent Act tenancies), it does not deal with problems arising after the termination of the marriage.

In most of these respects the effect of Part I of the Matrimonial Proceedings and Property Act 1970 [78] is the exact opposite: these provisions deal with property rights in general and not with a particular type of asset, but their operation is restricted to situations of marriage breakdown, and, which *de lege ferenda* may turn out to be decisive, in those aspects which are most important in the present context, restricted to the post-divorce and post-annulment and post-judicial separation situations.

Unlike the Matrimonial Homes Act, the 1970 Act is not a new venture of the Legislature into a *terra incognita.* It presents itself as an expansion and systematisation of the—oddly named—ancillary provisions of the Matrimonial Causes Act which deal with the financial relations between the spouses. It is the expansion that matters, because the 1970 Act, by giving new powers to the Family Division of the High Court and to the county courts over and above those which were partly inherited from nineteenth-century and partly from earlier twentieth-century legislation, has in fact made it possible for the courts to give effect to a reform in matrimonial property law—much depends on how the new provisions will be applied. As the Law Commission points out, these powers are likely still to be needed in a system which, in one form or another, gives effect to the principle of a community in family assets, though they will have to be modified.[79]

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[74] The significance of this is emphasised by the Law Commission in Report No. 25, para. 50, note 27.

[75] [1944] K.B. 309.

[76] *Old Gates Estates Ltd.* v. *Alexander* [1950] 1 K.B. 311 (C.A.); *Middleton* v. *Baldock* [1950] 1 K.B. 657 (C.A.); *Wabe* v. *Taylor* [1952] 2 Q.B. 735.

[77] s. 7.

[78] The Act reproduces in most respects the Draft Bill attached to the Law Commission's Report No. 25: *Family Law. Financial Provisions in Matrimonial Proceedings* (July 1969). In para. 2 the Law Commission expresses the hope that its proposals " will go some way towards enabling the court on the breakdown of a marriage to deal with the family assets on an equitable basis," and, whilst one must agree with the Commission that the breakdown situation is the one which is most in need of regulation and that indeed (para. 8) by intervening in happy marriages the law may do more harm than good, it is regrettable that the most important of the potentially beneficial powers of the court are only available in cases of a permanent collapse of the marriage which has led to divorce, judicial separation or annulment.

There are two types of provisions which may in practice be closely connected but which are nevertheless different in nature; those which refer to the payment of capital sums ("lump sums") as a form of maintenance,[80] and those which refer to the transfer of specific assets, the settlement or the variation of the settlement of specific property, and the extinction of specific property interests arising under a setlement or their reduction,[81] a distinction rooted in the corresponding distinctions inherent in the Matrimonial Causes Act of 1965 and the legislation preceding it.

(a) An order that one spouse shall pay to the other such lump sum (or sums)[82] as may be specified by the court[83] may be made on granting a divorce, nullity or separation decree or at any time thereafter—the power to do so by way of secured maintenance in divorce and nullity cases goes back via the Matrimonial Causes Acts of 1965[84] and 1950[85] and the Judicature Act 1925[86] into the nineteenth century.[87] Secured maintenance is, as it always was, an arrangement mainly for that minority of families which dispose of considerable accumulations of capital. The idea that a lump sum order can also be made for purposes of maintenance is the result of developments of our own time. It responds to the needs of families which, without possessing considerable real estate or stock exchange securities usable as a security, may have accumulated savings or possess chargeable property[88] sufficient to finance a cash lump sum payment.[89] The power to order a lump sum payment in cases of divorce, annulment and separation was first introduced by the Matrimonial Causes Act 1963,[90] and then found its way via the Act of 1965 [91] into that of 1970.[92] The 1970 Act, however, introduced a further innovation [93]: it enables the court to make a lump sum order without granting any other matrimonial relief. The procedure, first introduced in 1949 [94] and then consolidated in the statutes of 1950 [95] and of 1965,[96] by which the wife (and in exceptional cases the husband) can obtain a maintenance order in the High Court by reason of wilful neglect to maintain may now lead to a lump sum payment. Moreover, the Act of 1970 has also introduced lump sum payments to or for the benefit of children of the family.[97]

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[79] *Op. cit.*, para. 67.

[80] s. 2 (1) (*c*) and s. 2 (2); s. 3 (2) (*c*) and s. 3 (3) and (4); s. 6 (6) (*c*) and (*f*) and s. 6 (7).

[81] s. 4.

[82] s. 2 (1) (*c*) says "sum or sums," ss. 3 (2) (*c*), 6 (6) (*c*) and (*f*) say "sum."

[83] According to s. 27 (1) this means the High Court or a divorce county court (Matrimonial Causes Act 1967, s. 2). No such powers exist under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.

[84] ss. 16 (1) (*a*), 19.

[85] s. 19 (2).

[86] s. 190 (1).

[87] Matrimonial Causes Act 1857, s. 32.

[88] See Law Commission Report No. 25, para. 9.

In its Report on Financial Provisions, the Law Commission [98] expressed the "considered opinion that the courts should be more ready to award lump sums." The Commission referred to the difficulty of enforcing periodical payments, to the bad psychological effect which they often have, and—a point borne out by the decision of the Court of Appeal in *Curtis* v. *Curtis* [99]—to the advantage that the lump sum can and the periodical payments cannot be proved in bankruptcy. The "respectful exhortation to judges and registrars that they should exercise the powers more realistically" and apparently also the "exhortation to the parties' legal advisers to ask for such orders more often" [1] seems to be necessary, judging from the paucity of the cases on lump sum awards reported since 1963 and from the opinions expressed in the few—altogether five [2]—relevant decisions of the Court of Appeal reported at the time of writing (end of July 1970). Several members of the Court of Appeal expressed the opinion that lump sum orders would only be made in exceptional cases.[3] The underlying sentiment seems to be that this is something mainly to be used in cases like *Davis* v. *Davis*, *Curtis* v. *Curtis*, and *Brett* v. *Brett* as a substitute for the "conscience of the rich." Yet cases such as *Hakluytt* v. *Hakluytt*, and especially

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[89] Such as the families considered by the Court of Appeal in *Hakluytt* v. *Hakluytt* [1968] 1 W.L.R. 1145, and in *von Mehren* v. *von Mehren* [1970] 1 W.L.R. 56.

[90] s. 5 (1).

[91] ss. 16 (1) (c), 19, 20 (1).

[92] s. 2 (1) (c), (2).

[93] s. 6 (6) (c) and (7).

[94] Law Reform (Miscellaneous Provisions) Act 1949, s. 5.

[95] s. 23.

[96] s. 22.

[97] ss. 3 (2) (c) (3) and (4), 6 (6) (f), (7).

[98] para. 9.

[99] [1969] 1 W.L.R. 422.

[1] Report No. 25, para. 17.

[2] *Davis* v. *Davis* [1967] P. 185; *Hakluytt* v. *Hakluytt* [1968] 1 W.L.R. 1145; *Curtis* v. *Curtis* [1969] 1 W.L.R. 422; *Brett* v. *Brett* [1969] 1 W.L.R. 488; *von Mehren* v. *von Mehren* [1970] 1 W.L.R. 56.

[3] *e.g.*, Willmer L.J. in *Davis* v. *Davis* at p. 191; in *Hakluytt* v. *Hakluytt* at p. 1149 and in *Brett* v. *Brett* at p. 492; Edmund Davies L.J. in *Hakluytt* v. *Hakluytt* at p. 1151; Karminski L.J. in *von Mehren* v. *von Mehren* at p. 61.

von Mehren v. *von Mehren*, show how this power of the court may be used in more humble circumstances, and also show that the remedy should by no means be necessarily "supplementary" to periodical payments, though it was in the actual cases.[4]

At first sight it may appear that the subject of lump sum payments is not germane to the present article: this, after all, is part of the law of maintenance. So it is: but the institution of the lump sum payment, that is, of the transfer of capital not for the purpose of securing periodical payments covering current expenses, but for that of a re-adjustment of capital assets within the family, shows that the problems of maintenance and of property can no longer be separated: and this linking of the two sets of issues is no more than one legal aspect of that social transformation to which reference was made above.[5] This observation is confirmed by a distinction made in the statute between periodical payments and the payment of a lump sum by way of instalments[6] which in turn may be secured. It corresponds, if the comparison is permissible, to the difference between rent and instalments paid towards a purchase price: one refers to current needs or is the equivalent of the current use of a thing, the other refers to non-recurrent needs or a non-recurrent value transferred. Nor is the nature of the lump sum payment as a transfer of a capital asset impaired by the fact that, according to another provision in the statute, the lump sum order may be used to enable the recipient to meet liabilities or expenses reasonably incurred in maintaining himself or herself or a child of the family,[7] or similarly incurred by a child of the family or by a third party for his benefit.[8] That this new institution helps to replace the "deserted wife's agency of necessity" (abolished by the 1970 Act at long last)[9] and that the capital transfer may thus make up for past current expenditure does not, it is submitted, detract from the validity of the statement that this is, or rather may be, applied as a procedure assisting in the adjustment of the spouses' property.

Some of the decided cases bear this out. In *Hakluytt* v. *Hakluytt* the lump sum payment served the object of financing necessary repairs to the wife's house, and in *von Mehren* v. *von Mehren* to enable her, mainly with the husband's means, to acquire a home for herself and the children which—as a guesthouse—could also yield a modest income. The sensible arrangement in this case which Winn L.J. recommended to the attention of the legal profession [10] consisted in the setting up of a trust deed by which the £4,000 contributed by the husband—almost half his capital resources—would revert to him in certain events, such as the wife and children pre-deceasing him. It was thus precisely the measure the court will after December 1970 be able to take under section 4 (*b*) of the Act by ordering the husband to settle part of his property. If it were not for the fact that the powers under section 4 can only be exercised in divorce, annulment and judicial separation cases, and not in cases where the court's jurisdiction is based on section 6, one would be tempted to think that perhaps the Law Commission's exhortation will lose some of its force through the availability of better remedies under the Act based on the Commission's own recommendations. It should be noted that in three out of the five reported cases the lump sum payments were intended to finance a particular purchase or acquisition [11] connected with the finding of a new home for the wife, but it was also indicated in another case that the award of a lump sum was not restricted to such cases.[12]

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[4] See Phillimore L.J. in *Brett* v. *Brett* [1969] 1 W.L.R. at p. 494.

[5] Part II. The observation made by the Law Commission (Report No. 25, para. 49) that the introduction in 1968 of the lump sum order has blurred the line between provision from income and provision by way of capital adjustment, is well illustrated by the case of *von Mehren* v. *Mehren*, *supra*.

[6] ss. 2 (2) (b), 8 (4), 6 (7) (b). See also Law Commission, *op. cit.*, para. 89.

[7] ss. 2 (2) (a), 6 (7) (a).

[8] s. 8 (8).

[9] s. 41. See Law Commission, *op. cit.*, para. 10.

It will be observed that we are moving entirely in the "internal" sphere—the 1970 Act affects the matrimonial property situation only between husband and wife—but that we are now discussing a measure which can be taken without reference to any particular asset. It can be taken in the light of the needs and means, the standard of living and other circumstances of the family [13] including the conduct of the parties.[14] It can—and this is perhaps the most important aspect—be taken to compensate one spouse (usually the wife) for the loss of expectations [15] resulting from a divorce, the most important of which is often the loss of a pension expectation.[16] It is in this context that one sees its principal practical function, and the possibility, adumbrated by the Law Commission,[17] of this becoming one method of allowing the effort of the housewife to be rewarded by a share in the capital assets.

But in this context one also sees its limitations. Apart from the cases of divorce, annulment and separation, this property adjustment pre-supposes a "wilful" neglect to maintain, which seems to be quite irrelevant to the matter here in issue. If spouses separate by agreement, the assistance of the court is not available for their property adjustments. In those difficult situations in which the wilfulness of the failure to maintain is problematical[18] this power too becomes problematical. The principle of mutuality which otherwise dominates the Act has (perhaps rightly) been abandoned in relation to maintenance payments by reason of wilful neglect: these can be claimed by a husband only in exceptional situations.[19] It is difficult to see why the property adjusting power of the court through the ordering of lump sum payments should have to be exercised in a similarly lop-sided way, seeing that no such distinction exists in the event of divorce, annulment or judicial separation, either as regards lump sum payments or as regards the other property regulation powers of the court.

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[10] [1970] 1 W.L.R. at p. 62.

[11] *Davis* v. *Davis*, *Hakluytt* v. *Hakluytt*, *von Mehren* v. *von Mehren.*

[12] Willmer L.J. in *Brett* v. *Brett* [1969] 1 W.L.R. 493.

[13] *s.* 5.

[14] This—one hopes—will acquire a different place in the argument when the Divorce Reform Act 1969 is in operation. See *e.g.*, *Davis* v. *Davis* [1967] P. at p. 194; *Brett* v. *Brett* [1969] 1 W.L.R. at p. 492.

[15] See Willmer L.J. in *Brett* v. *Brett* [1969] 1 W.L.R. at pp. 492 *et seq.*; Phillimore L.J. *ibid.* at p. 495.

[16] See s. 5 (1) (*g*) and the Law Commission's Report No. 25, para. 9.

[17] *ibid.*, para. 6.

It is however noteworthy that this "property adjustment power" can be exercised outside divorce, nullity and separation proceedings. It is the only power of this kind under the 1970 Act which can be so exercised. The powers to vary or to order settlements and to transfer specific assets to which we must now turn presuppose a divorce, nullity or separation decree. Section 4 does not apply in the situation envisaged in section 6 of the Act.

(b) Like those on lump sum payments, the provisions of the 1970 Act on the powers of the court to order[20] and to vary[21] settlements are derived from previous legislation[22] and therefore encumbered with the heritage of a body of case law some of which will however, one hopes, be treated as obsolete.

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[18] Especially where they separate without regulating maintenance. For a discussion of these and other problematical situations see Bromley, *Family Law* (3rd ed.), pp. 214 *et seq.* See also the Law Commission's Report No. 25, paras. 20 and 21.

[19] The reasons for the abandonment of the mutuality principle are set out *ibid.*, para. 18. It is not easy to see why the factual inequality should not here as in s. 2 have been left to the consideration of the judge in the individual case, in the light of s. 5.

[20] s. 4 (*b*).

[21] s. 4 (*c*) and (*d*).

[22] The power to vary a settlement originates in the Matrimonial Causes Act 1859, s. 5, and was taken over by the Judicature Act 1925, s. 192, the Matrimonial Causes Act 1950, s. 25, and the Matrimonial Causes Act 1965, ss. 17 (1) and 19. The words "and the courts . . . children of the family" at the end of the present s. 4 are a purely historical incumbrance. They go back through the 1965, 1950 and 1925 Acts to the Matrimonial Causes Act 1878, s. 3 where they had been enacted because in *Thomas* v. *Thomas* (1860) 2 Sw. & Tr. 89; *Bird* v. *Bird* (1866) L.R. 1 P. & D. 231; and *Corrance* v. *Corrance* (1867) L.R. 1 P. & D. 235 the words "settlement for the benefit of the children of the marriage or of their respective parents" had been held to exclude a marriage of which there was no issue at the time of the decree (see Vaughan Williams L.J. in *Dormer* v. *Ward* [1901] P. 20, 30 *et seq.*). However, in the 1925 Act these words of the 1859 Act were replaced by a reference to "property settled either for the benefit of the children of the marriage or of the parties to the marriage," and the words of the 1878 Act thus became redundant. They were nevertheless carried over from one statute to the next although they ceased to make sense in 1925. The power to order a settlement originates in the Matrimonial Causes Acts 1857 (s. 45) and 1884 (s. 3), and then appeared in the Judicature Act 1925, s. 191, and in an amended form (resulting from the change in the divorce law through the Matrimonial Causes Act 1937) in the Matrimonial Causes Act 1950, s. 24, and in the Matrimonial Causes Act 1965, ss. 17 (1), 20 (2) and 21 (3) (*a*).

(i) The most conspicuous change in the law concerning settlements is that the court is now able to order the husband as well as the wife to make a settlement for the benefit of the other spouse or a child of the family.[23] This is likely to have a profound effect on the powers of the court to regulate the property relation of the spouses in the event of the collapse of the marriage. The corresponding power of the court to order a settlement of the property of a wife guilty of adultery, desertion or cruelty [24] was rarely used in practice. As the Law Commission points out,[25] this power may enable the court to ensure that money to be paid by the husband to the wife remains in the family, *i.e.* to order a settlement instead of payment of a lump sum. The recent case of *von Mehren* v. *von Mehren* [26] where the parties themselves made this arrangement (which the court could not then have imposed) shows how the new provision may operate. At the same time this may somewhat reduce the significance of the variation of transactions precariously classified as "settlements" [27] simply because a more straightforward remedy is available.

(ii) Another, and, one hopes, more pervasive change, both in the power to order and in the power to vary settlements will result from the abandonment of the principle of the matrimonial offence and its replacement by the principle of marriage breakdown in the Divorce Reform Act 1969.[28] This may give to the measures to be taken by the court their proper function as a means towards the adjustment of property relations in those families which have a modicum of accumulated wealth, and to make these measures look to the future and not to the past. Hitherto the wording of the statute compelled the courts to place the question of "guilt" and "innocence" in the centre of things when asked to order a settlement, and their own interpretation of the law did the same in connection with variations. The dead hand of Lord Penzance's judgment in *March* v. *March* [29] (1867) has now, with the disappearance of the reference to "adultery, desertion or cruelty" as bases of the order to settle property, at last been removed. The degree to which that judgment dominated the scene can be gauged *e.g.* from the reasoning underlying the fairly recent case of *Compton* v. *Compton*.[30] Lord Penzance combined two lines of policy. One was concerned with "restoring in a reasonable degree the pecuniary status of the parties," the other with preventing the sinful wife from carrying away the family fortune, possibly to serve as the dowry of a union with an adulterer. These two policies can be separated.

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[23] s. 4 (*b*) compared with s. 17 (2) of the 1965 Act. On the anomalies of the old law see Law Commission Report No. 25, para. 50 (a), and also para. 64.

[24] Matrimonial Causes Act 1965, s. 17 (2).

[25] *Op. cit.*, para. 50 (*a*).

[26] [1970] 1 W.L.R. 56 (C.A.).

[27] See the observations of the Law Commission *op cit.*, para. 66, and see below.

[28] s. 1.

[29] L.R. 1 P. & D. 440—a case on variation which was often quoted in cases on orders of settlement.

[30] [1960] P. 201.

Even though the wording of the statute did not compel them to do so the courts imported this "moralising" element also into the variation of existing settlements.[31] It is true that the courts here excluded "the element of punishment, the idea that this is some sort of a penal jurisdiction against the guilty spouse" and no order was to be "based on the idea of punishing the guilty spouse."[32] Yet in practice this jurisdiction was exercised almost exclusively on behalf of an "innocent" party. Lord Merrivale P. said in 1925[33] that the records would "be searched in vain for any instance where the court at the instance of a guilty party has varied or annulled a settlement," and although such cases did happen in more recent years,[34] the courts never disclaimed the mid-Victorian sentiment of Lord Penzance that it was their task to promote virtue and to discourage immorality.[35] To put it no higher, the jurisdiction was said to serve the object of making "provision . . . for the innocent party."[36]

The Divorce Reform Act has, one hopes, put an end to the pretension of the courts to exercise their matrimonial jurisdiction as *custodes morum*. In exercising their jurisdiction to regulate, in the interests of the family, the property relations of spouses or former spouses, the court must have regard to many things, including the "conduct" of the parties,[37] but the mere fact that many marriages will in future be dissolved on the basis of two or five years' separation precludes even the shadow of a thought that this reference to "conduct" can be interpreted in the light of the defunct notion of a "matrimonial offence." In Lord Herschell's classical words, a recurrence to the cases decided before 1971 would mean that the "utility" of the statute "will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."[38]

(iii) Whilst hitherto a settlement of property could be ordered only in cases of divorce, judicial separation, and also the now happily abolished[39] restitution of conjugal rights,[40] and settlements could be varied after a divorce or nullity decree,[41] the jurisdiction to order a settlement has now been extended to cases of annulment and that to vary settlements to separation decrees, but not to magisterial non-cohabitation orders.[42] None of these measures can be taken in proceedings under section 6 of the Act, *i.e.* where either spouse claims maintenance only. This is a point of fundamental importance: this method of regulating matrimonial property is not generally available in the event of a breakdown of the marriage, but only if the breakdown leads to the termination of the marriage by the court—judicial separation is, as the Law Commission rightly points out,[43] in every context except that of remarriage, equivalent to a judicial termination of the union. Thus, whilst the court can in the absence of a divorce, nullity, or separation decree, order one spouse to pay a capital sum in cash to the other,[44] it cannot order him to transfer securities instead, or to settle the sum instead of paying it out unconditionally.[45] Why one but not the other step should be considered as sufficiently " drastic " to be taken only if it is " pretty clear that the marriage has broken down permanently," and why the transfer of securities should, but the payment of a lump sum should not, be " likely to hinder the prospects of reconciliation " [46] has not become clear to the present writer. One would have thought that property regulation powers should be available in all situations of marriage breakdown. The decisions of the House of Lords in *Pettitt* v. *Pettitt*[47] and in *Gissing* v. *Gissing*,[48] have emasculated section 17 of the Married Women's Property Act and cut down the general powers of the courts to help the parties to a sensible arrangement of their affairs. The restriction of the powers of the courts under section 4 of the 1970 Act to divorce, nullity and separation proceedings has thus gained a cardinal significance *de lege ferenda*. In those exceptional cases in which a separation decree is rescinded or supplanted by a divorce, the court has the power to vary a property regulating measure taken under section 4 [49] (whilst otherwise neither property regulating measures nor lump sum orders can be varied.[50]) It is difficult to see why similar arrangements could not have been made for cases arising under section 6, and why indeed the court should not have the power to take property regulating measures without being asked to do anything else. The present writer is inclined to feel that this may turn out to be one of the most important elements of the evolving discussion of the future of matrimonial property law. Much of what the

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[31] Where it does not emerge from the statute itself. Compare s. 17 (1) with s. 17 (2) of the 1965 Act. See on the whole problem here under discussion the article by Cretney, "The Maintenance Quagmire," esp. p. 666.

[32] *Per* Lord Greene M.R. in *Tomkins* v. *Tomkins* [1948] P. 170.

[33] In *Reid* v. *Reid* [1926] P. 1, 3.

[34] Such as *Johnson* v. *Johnson* [1950] P. 23 (C.A.).

[35] See Bromley, *op. cit.*, p. 266.

[36] Lord Hanworth M.R. in *Prinsep* v. *Prinsep* [1930] P. 35, 40. See also *Constantinidi* v. *Constantinidi* [1905] P. 253, esp. pp. 272 *et seq.*

[37] s. 5 of the 1970 Act.

[38] In *Bank of England* v. *Vagliano* [1891] A.C. 107, 144 *et seq.* It is not often mentioned that the Liberal Herschell's attitude to codification was, surprisingly perhaps, shared by the Conservative Halsbury: p. 120.

[39] 1970 Act, s. 20.

[40] Matrimonial Causes Act 1965, ss. 17 (2), 20 (2), 21 (3) (c).

[41] *Ibid.* ss. 17 (1), 19.

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[42] 1970 Act, s. 4. See on the policy consideration underlying this scheme: Law Commission Report No. 25, para. 66, and on the question of magisterial jurisdiction p. 83, note 48.

[43] *Ibid.*: "It almost invariably denotes the death of the marriage."

[44] s. 6 (6) (*c*).

[45] s. 4 (*a*) and (*b*).

[46] Law Commission Report No. 25, para. 65.

[47] [1969] 2 W.L.R. 966.

[48] [1970] 3 W.L.R. 255.

[49] s. 9 (2) (*d*) and (4). See on this, Law Commission Report No. 25, paras. 75, 83.

[50] s. 9 (2).

Germans tried to do in 1957[51] and the French in 1965[52] might be achieved that way.

(iv) On the face of it the new legislation does not change the meaning of the term "settlement" either for the purpose of the power to order either spouse to settle property or for that of varying an existing ante- or post-nuptial settlement. It is well known that for a century or more the courts have endeavoured to place a very wide interpretation on the term "settlement" for the purposes of matrimonial law, so that the court can vary arrangements which neither in the sense of the general property law nor in the more special sense of bankruptcy law would be called settlements at all.[53] Any transaction which provides "for the benefit of the one or other or both of the spouses as spouses and with reference to their married state"[54] is a settlement no matter whether it is a transaction between them or between either or both and a third party, provided however that it contains an element of "continuing provision," that something still remains to be done under it. It may be a provision made by one spouse for the other in the form of periodical payments[55] such as a covenant to pay an annuity[56] or a gift of a life annuity[57] or a separation and maintenance agreement.[58] It may be a life assurance policy taken out by the husband for the benefit of the wife under section 11 of the Married Women's Property Act 1882[59]; it may even be the conveyance of a house to be used as a matrimonial home, whether conveyed to both and jointly held by them on a trust for sale[60] or conveyed to one in circumstances constituting a resulting trust for the benefit of the other, or a share in it,[61] and irrespective of whether one of them or both found the money.[62] Yet, the Court of Appeal held in 1958 [63] that "an out-and-out and unqualified transfer of property by one spouse to the other cannot be regarded as a settlement" [64] and there is no reason to think that this would not also apply to a gift by a third party. Why one principle should apply to a conveyance to the spouses as joint tenants on trust for sale, and another to the assignment of a leasehold house and furniture [65] or a gift of securities,[66] is an inscrutable mystery; but fortunately this mystery is now becoming irrelevant, and we can lay aside the intellectual microscope in which "distinctions" in facts become visible which to the naked eye appear only as differences of opinion between judges. Since the court can now [67] order one spouse to transfer property to the other, it could, if the facts of *Hubbard* v. *Hubbard* or of *Prescott* v. *Fellowes* arose after December 31, 1970, and if it thought right to do so, order the wife in the first case to return the house and furniture to the husband, or the husband in the second case to return to the wife the securities or part of them. Presumably "property" in section 4 includes cash, so that a cash payment in lieu of restitution *in specie* could also be ordered, but in any event this could be done through a lump sum order under section 2 or section 6. What is most important is that section 4 (*a*) enables the court to deal with the matrimonial home and its contents, bearing in mind, *inter alia*, "the contribution made by each of the parties to the welfare of the family, including contributions made by looking after the home or caring for the family." [68]

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[51] *Gleichberechtigungs-Gesetz* of June 18, 1957. For a discussion, see (1959) 22 M.L.R. 241.

[52] Loi no. 65–570 of July 13, 1965—D.S. 1965, Législ. 233.

[53] See for this Bromley, *Family Law* (3rd ed.), pp. 261 *et seq.* The reference is of course to s. 42 of the Bankruptcy Act 1914.

[54] *Per* Hill J. in *Prinsep* v. *Prinsep* [1920] P. 225, 232. The Law Commission (Report No. 25, para. 50 (b)) defines it as "in effect any property acquired by the parties or either of them as husband or wife other than under an out-and-out disposition in favour of them alone."

[55] *Per* Romer J. in *Bosworthick* v. *Bosworthick* [1927] P. 64, 72.

[56] *Dormer* v. *Ward* [1901] P. 20 (C.A.).

[57] *Bosworthick* v. *Bosworthick*, *supra.*

[58] *Tomkins* v. *Tomkins* [1948] P. 170 (C.A.); *Jeffrey* v. *Jeffrey* [1952] P. 122 (C.A.). Clearly the court can vary a separation and maintenance agreement as a settlement. But it has a similar power under the special provisions originally enacted in the Maintenance Agreements Act 1957, subsequently in ss. 23–25 of the Matrimonial Causes Act 1965, and now in ss. 13–15 of the Act of 1970. The two powers exist side by side (see s. 14 (6)), but they differ in important details, *e.g.* the power under s. 14 can in certain circumstances be exercised by a magistrates' court and it can be exercised after the death of one of the parties.

[59] If premiums are still to be paid (*Gunner* v. *Gunner* [1949] P. 77). If the policy does not operate under s. 11, the wife's interest in the policy is only contingent and the operation is therefore a "settlement" (*Bown* v. *Bown* [1949] P. 91).

[60] *Smith* v. *Smith* [1945] 1 All E.R. 584; *Brown* v. *Brown* [1959] P. 86 (C.A.); *Radziej* v. *Radziej* [1967] 1 W.L.R. 659; [1968] 1 W.L.R. 1928 (C.A.).

The definition of a "settlement" has thus, through the operation of section 4 (*a*), lost some of its importance, and, as the Law Commission points out,[69] this is also the result of the new power of the court to order a settlement of the husband's property which relieves it of the compulsion to stretch the term "settlement" to breaking point. That which had to appear as an order varying a settlement can now be openly presented as an order for a settlement which does not as yet exist.

In these circumstances it is perhaps less important than otherwise it might have been that the power to vary settlements is still confined to ante- or post-nuptial settlements, *i.e.* to settlements of property on either spouse or both spouses in that capacity.[70] It has been made clear—the point had been doubtful [71]—that this covers settlements by will.[72] It has also been made clear—another dubious point under the previous law—that the rights of either spouse (but not those of a child) under a settlement can be extinguished by the court.[73]

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[61] *Cook* v. *Cook* [1962] P. 235 (C.A.); *Ulrich* v. *Ulrich* [1968] 1 W.L.R. 180 (C.A.).

[62] Contrast *Smith* v. *Smith*, *supra* (note 60), with *Brown* v. *Brown* (*ibid.*) and with *Cook* v. *Cook* (note 61).

[63] *Prescott* v. *Fellowes* [1958] P. 260, following *Hubbard* v. *Hubbard* [1901] P. 157 (C.A.).

[64] *Per* Romer L.J. at p. 288.

[65] *Hubbard* v. *Hubbard*, *supra*.

[66] *Prescott* v. *Fellowes*, *supra*.

[67] s. 4 (*a*) of the 1970 Act.

[68] s. 5 (1) (*f*).

[69] Law Commission Report No. 25, para. 68. *Compton* v. *Compton* [1960] P. 201 shows that even under the previous law the power of the court to order a settlement of the wife's property supplemented and filled the gaps of its power to vary settlements. But with the extension of the power to order a settlement this has of course now become very much more important.

(v) The definition of the family group within which property-regulating orders can be made shows how closely the whole subject of matrimonial property is linked with that of family maintenance. Whilst it is true that only the property of either spouse is subject to orders for transfer or for a settlement, that only settlements made on the spouses can be varied and only interests under such settlements can be extinguished, the benefit of these measures can be made to enure to the " children of the family," *i.e.* to those children who are also entitled to maintenance.[74] To this there is however an exception: whilst the maintenance obligation of the parents does not extend to children above a certain age (normally eighteen), property can by order of the court be settled and existing settlements can be varied for the benefit of a child of the family of any age.[75] A transfer order cannot however be made in favour of a child over eighteen,[76] unless the child is receiving institutional education or is being trained for a trade, profession or vocation, or by the transfer of property to be enabled to receive such education or training, or unless there are other special circumstances, such as (presumably) physical or mental disabilities.[77] Transfer orders are thus more closely liked to the maintenance obligation than settlement orders. This is in line with the function which the Law Commission ascribes to these transfer orders as measures to be taken as supplements to, or substitutes for, lump sum payment orders.[78] The definition of the term "child of the family" (which cannot here be discussed)[79] shows that the family group within which the property regulation power operates is understood in partly biological and partly sociological terms. In view of the power to make settlement (though normally not transfer) orders for the benefit of grown-up children (who may have established their own households) it is not possible to say that this power operates entirely within the "household" or "nuclear" family. There may be cases (especially among the well-to-do) where it operates in a kinship group which has long ceased to be a community of life.[80] One does not, therefore, quite understand why the powers concerning settlements cannot be exercised for the benefit of more remote issue such as grandchildren.

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[70] See on this Law Commission Report No. 25, para. 66.

[71] *Loraine* v. *Loraine* [1912] P. 222 (C.A.) as (apparently wrongly) interpreted by Hill J. in *Garratt* v. *Garratt* [1922] P. 230, 234 and by Lord Hanworth M.R. in *Melvill* v. *Melvill* [1930] P. 159, 172. See the discussion by Bromley, *op. cit.*, p. 264.

[72] s. 4 (c) *ad finem.*

[73] s. 4 (*d*). See Law Commission Report No. 25, para. 74, and the analysis by Bromley, *op. cit.*, p. 269.

[74] See s. 27 (1) of the 1970 Act. The substitution of the term " children of the family " in s. 4 for " children of the marriage " in the two subsections of s. 17 of the Matrimonial Causes Act 1965 was an important and welcome step. The policy problems are discussed by the Law Commission in Report No. 25, para. 72.

[75] s. 4 (*b*)–(*d*) are not mentioned in s. 8. The matter is discussed by the Law Commission, *op. cit.*, para. 78.

[76] s. 8 (1) (*a*). This too is discussed in para. 78 of the Law Commission's Report where it is said that such transfers of property to a child are to be ordered " only as an alternative to a lump sum payment in cash where needed for the advancement or education of the child." See also para. 70. This is entirely justifiable and a matter quite different from a transfer between spouses (see below).

[77] s. 8 (3).

(vi) Whereas the new regulation of the powers to settle property and to vary settlements is an extention, rationalisation and systematisation of the pre-existing law, the power to order a transfer of property is a complete innovation. As it stands, it seems to open up very great possibilities and (within its sphere of application, *i.e.* in the event of divorce, annulment or separation) to enable the court to do precisely those things for which, after *Pettitt* v. *Pettitt*,[81] section 17 of the 1882 Act may no longer be available. As it stands, it appears to be just that instrument for an equitable distribution of household or family assets which section 17 of the 1882 Act at one time seemed to be, and which is the most urgent *desideratum* in the law of family property at the present day. It is that part of the property regulation provisions in section 4 which can be of special importance to the large majority of families in which there is nothing to "settle." It is also that part of section 4 which under such conditions can be most easily used to implement the policy so to apply the law as to reward the housewife for her contribution to the welfare of the family,[82] and to compensate the wife for the loss of pensions expectations[83] (which, even on the most generous interpretation of that word, are not normally based on "settlements" in the recognised sense).

Perhaps it would be too optimistic to expect that the courts will thus interpret the new power. The "intention of the legislature" is too plainly against it. When interpreting a statute which in so many respects follows the Law Commission's own draft even the most hardened enemy of *travaux préparatoires* will not resist the temptation of glancing at the Commission's Report [84] and there he will find that the power to transfer property was not expected to be normally ordered "except as an alternative to a lump sum in cash," although the possibility of a transfer of the matrimonial home or of a share in it is also mentioned.

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[78] See below.

[79] Special considerations must however be taken into account when making a property regulation order against a spouse and in favour of a child of the family who is not a child of that spouse: s. 3 (3).

[80] The decision of the Court of Appeal in *May* v. *May* [1961] 2 All E.R. 204 (C.A.) shows how in the exercise of its power to order a settlement a court may treat "the child as the primary person for consideration" (Holroyd Pearce L.J. at p. 206). It also shows an interesting example how while keeping the capital separate, the income can be used for purposes which would have been the joint purposes of the family if it had not collapsed (the purpose here being the education of the boy).

[81] [1969] 2 W.L.R. 966.

[82] s. 5 (1) (*f*).

[83] s. 5 (1) (*g*).

Moreover, even if section 4 (*a*) were to be construed as a new departure and not as a provision ancillary to the lump sum powers laid down elsewhere in the Act, its potentialities would be limited because it could be used only in the event of divorce, annulment or judicial separation.

(vii) The purposes for which the property regulation powers (and also the lump sum powers) are to be exercised are codified in section 5 of the Act. Lord Penzance saw these purposes mainly in terms of the protection of expectations and the restitution of the conditions which would have prevailed if the family had not collapsed.[85] This is still the policy of the law and it is reflected in the important provisions which enjoin the court to have regard to the standard of living of the family,[86] to the contributions made by its members, especially by the housewife,[87] to the loss of financial (including pensions) expectations by a spouse,[88] and the protection of the educational expectations of a child.[89] But alongside these we find the references to future resources [90] and needs [91] as well as the "conduct" of the parties. The catalogue of purposes may *de lege ferenda* be significant for the definition of the policy which should be pursued by the discretionary regulation of matrimonial property relations in general.

VI

These, then, are the principal steps taken by legislation to adjust matrimonial property law to the social change we are witnessing, and this is the foundation on which the impending measure of systematic law reform has to be built. The courts cannot, and perhaps ought not to be the agents of this reform. *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing* have shown the inability of the courts so to apply the existing legal framework as to make it a reliable tool for the necessary adjustment.[92] A survey of the cases decided since the Second World War [93] shows that, few exceptions apart,[94] two major issues have to be settled by the courts: the right to occupy the matrimonial home and the distribution of assets (especially the matrimonial home and its contents) or their proceeds in the event of a breakdown of the marriage. In both respects the courts have been unable to provide adequate solutions. The first problem was largely solved by the Matrimonial Homes Act 1967. The second problem was attacked but only partly solved by the Act of 1970. Parliament will now have to do for the second problem what in 1967 it did for the first: to eliminate the conflict which has arisen within the lower courts and between them and the House of Lords, a conflict going to the roots of the legal system, the role of the judiciary in society, the choice between equity and predictability. The statute of 1967 was the answer to *National Provincial Bank* v. *Ainsworth*.[95] We are now waiting for the answer to *Pettitt* v. *Pettitt* and to *Gissing* v. *Gissing*.

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[84] Para. 68. The clause of the Draft Bill which would have enabled the courts openly to use the Commission's Report when interpreting the Act was however deleted by Parliament.

[85] *March* v. *March* (1867] L.R. 1 P. & D. 440. This has been repeated with and without variations in subsequent decisions on many occasions. It now appears *mutatis mutandis* as the "tailpiece" to s. 5 (1) and to s. 5 (2) of the 1970 Act.

[86] s. 5 (1) (*c*), 5 (2) (*d*).

[87] s. 5 (1) (*f*).

[88] s. 5 (1) (*g*).

[89] s. 5 (2) (*e*).

[90] s. 5 (1) (*a*), 5 (2) (*b*).

[91] s. 5 (1) (*b*), also (*d*) and (*e*); s. 5 (2) (*a*), also (*c*).

[92] In *Pettitt* v. *Pettitt* [1969] 2 W.L.R. at p. 974 Lord Reid spoke of an "urgent need for comprehensive legislation," and Lord Morris of Borth-y-Gest (at p. 982), Lord Hodson (at p. 987), and Lord Upjohn (at p. 998) agreed that

If ever there was any illusion that section 17 of the 1882 Act could be the " chosen instrument " for this reform, this has now collapsed. True enough, the Legislature has tried to sharpen it, first in 1958,[96] by enabling the court to impose a balancing payment, and now, in 1970,[97] by making proceedings under section 17 available for three years after the dissolution or annulment of a marriage. Yet, since, it now appears, the court has no discretion under the section except to give effect to the intention of the parties,[98] the instrument must be too blunt to " cut the Gordian knot " where there is no evidence of " established rights " [99]—and this will be most frequently the case.

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this was a matter for Parliament. See also the observations of Lord Reid, *ibid.* at p. 972 about the need for leaving to Parliament decisions on matters of public policy " which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as lawyers."

[93] See the present writer's attempt to summarise the earlier developments in (1959) 22 M.L.R. 241, and see, for the more recent developments a very valuable article by J. Gareth Miller, " Family Assets " (1970) 86 L.Q.R. 98.

[94] *e.g.* joint accounts in *Gage* v. *King* [1961] 1 Q.B. 188; *Re Bishop* [1965] Ch. 450; *Re Figgis* [1969] Ch. 123; household savings in *Tymoszczuk* v. *Tymoszczuk* [1964] C.L.Y. 1748; *Re John's Assignment Trusts* [1970] 1 W.L.R. 955; wedding presents in *Samson* v. *Samson* [1960] 1 W.L.R. 190 (C.A.); property transfers between spouses in *Re Cole* [1964] Ch. 175 (C.A.); *Spellman* v. *Spellman* [1961] 1 W.L.R. 921 (C.A.); and indirectly in *Koppel* v. *Koppel* [1966] 1 W.L.R. 802 (C.A.). The problem of the contractual nature of agreements between spouses reared its head again in *Gould* v. *Gould* [1969] 3 W.L.R. 490 (C.A.).

[95] [1965] A.C. 1175.

[96] Matrimonial Causes (Property and Maintenance) Act 1958, s. 7.

[97] s. 39 of the 1970 Act.

[98] For a detailed analysis see the article by J. Gareth Miller, quoted in note 93. Where both spouses contribute to the purchase price, Lord Hodson ([1969] 2 W.L.R. at p. 987) thinks that the principle "equality is equity" can be applied without any reference to an alleged agreement, whilst Lord Upjohn (pp. 990 *et seq.*) thinks that the problem can be solved with the old apparatus of resulting trusts and presumptions of advancements which most of the other members of the House considered as out of tune with modern social conditions.

[99] See *per* Lord Denning M.R. in *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676 (C.A.), 1679 *et seq.*

To put it differently: *Pettitt* v. *Pettitt* and *Gissing* v. *Gissing* are based on the view that such powers as the courts have to adjust the law is derived not from any kind of discretion or " equity," but from the intention which, in most situations, the parties never had, but which, by a fiction, the court imputes to them.[1] This operation can be performed where both spouses have made cash contributions towards the acquisition of an asset—and now, by statute, contribution to improvement has been equated to contribution to acquisition.[2] Even in these situations the " intention " of the parties is normally a pure fiction: " The court may have to tell them " what was the legal meaning of what they did or said, and, under the guise of answering the question: " whose is this? " the court will, consciously or not, but almost inevitably, answer the question: " to whom shall this be given? " [3]

In a celebrated passage Sir Henry Maine wrote in 1861 [4]:

> " With respect to them [*i.e.* progressive societies] . . . social necessities and social opinion are always in advance of the law. We may come indefinitely near to closing the gap between them, but it has a perpetual tendency to reopen. Law is stable: the societies we are speaking of are progressive. The greater or less happiness of the people depends on the degree of promptitude with which the gulf is narrowed."

And he added his famous " general proposition " with respect to the conquest of what is nowadays called the " time lag," that is " with respect to the agencies by which the Law is brought into harmony with society ": " These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. . . I know of no instance in which the order of their appearance has been changed or inverted."

In so far as, prior to 1969, the lower courts attempted to solve the problem of bringing the law into harmony with society, they did so often through a kind of " equity." The recent decisions of the House of Lords may be that example of a reversal of the order of fiction and equity for which Sir Henry Maine was looking in vain. Maine's order will have to be restored by jumping across the " equity " stage, from fiction to legislation.

In these circumstances the Law Commission and the Legislature will, it is submitted, face at least four major separate, but closely connected, problems:

(i) Should such " community " elements as are to be introduced into the law operate in the "internal" sphere only—on the pattern of the existing law, with the exception of the registration and controlled tenancy provisions of the 1967 Act—or should they affect third parties? It may be of some interest that the idea of matrimonial community of property operating *erga omnes* is losing ground: it was rejected in Germany when in 1957 a system was introduced which combines separation of property with internal mutual accounting between the spouses in the event of marriage breakdown. It was also rejected in France (in fact if not in name) when in 1965 the new wine of separation was poured into bottles bearing the old label "*communauté*," a cherished *appellation controlée* which Frenchmen did not want to miss. In the classical country of matrimonial "community" a true community of goods can now exist only by virtue of a contractual arrangement.

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[1] See especially Lord Reid in *Gissing* v. *Gissing* at p. 260 and Lord Diplock in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. at p. 998, and also Lord Morris of Borth-y-Gest *ibid.* at pp. 977 and 981, Lord Hodson *ibid.* at p. 987, and Lord Pearson in *Gissing* v. *Gissing* at p. 265.

[2] s. 37 of the 1970 Act.

[3] See *per* Lord Morris of Borth-y-Gest in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. at pp. 975, 981.

[4] *Ancient Law*, Pollock ed., p. 29.

(ii) Assuming that it is now the policy to deal with the matter systematically, *i.e.* not only with marriage breakdown situations, should the regulation be left entirely to judicial discretion, or is there a need for a general norm, which might (but need not) be in the form of a rebuttable presumption, *e.g.* a presumption of equality? And, if the answer is in favour of the general norm, is there a further need for a judicial discretion to set it aside through what might be called a "matrimonial property adjustment order" available in the event of marriage breakdown?

(iii) Is the general norm, if any, and is the judicial discretion, if any, to be applied to concrete items of property (*e.g.* the matrimonial home with or without its contents) or to an aggregate of assets defined in the abstract (*e.g.* acquests, family assets, or indeed the aggregate of the spouses' property in its entirety)? Should—a possibility adumbrated by the Law Commission [5]—this judicial discretion apply to concrete property items while the marriage is a going concern and to an aggregate of assets after its breakdown?

(iv) If the law is to deal with an aggregate of assets, how should the property items belonging to it be identified? By the time and mode of acquisition (as in Germany and—in a different way—in France), *e.g.* on the basis of acquisition during the marriage, or acquisition not through liberality and inheritance but through work and thrift? Or should they be identified by their purpose, *e.g.* as assets for family use (family assets) or investments? This is a major policy decision, reflecting the fundamental purposes of the reform.

This, then, is where we stand today, and this—some may think—is where the story really begins. Perhaps it does, but sometimes it may be better to ask questions and to leave the answers to others, or to a future effort.

O. Kahn-Freund.*

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[5] Report No. 25, paras. 52–54.

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THE DIVORCE REFORM ACT 1969

THE basic grounds of divorce have not been altered by the legislature since the passing of A. P. Herbert's Bill in 1937. Statute law has remained faithful to the concept of the matrimonial offence as the sole ground for divorce, with the single exception of insanity. A small modification of the rigour of the law was made in 1963 with the relaxation of the law on collusion. There has, however, been considerable judicial development of the law since 1937 with the result that the breakdown of marriage has become an increasingly important factor in divorce cases. It seems that the judiciary, bearing in mind the limitations within which it works and noting certain regrettable lapses,[1] has up to now shown a more progressive attitude than the legislature. In their attitude to cruelty and collusion and in the exercise of their discretion where the petitioner has committed an offence, the courts have come very close to abandoning the idea that divorce is granted to innocent and against guilty spouses.[2]

Attempts to change the law were made by Mrs. Eirene White M.P. in 1950, and Leo Abse M.P. in 1963. The Morton Commission [3] reported in 1955 with ten in favour and nine against the doctrine of divorce for breakdown of marriage. The Church of England considered the matter and reported in 1966 [4] and in response the Law Commission issued its survey of the grounds of divorce which it considered were practicable.[5] Finally the Church and the Law Commission arrived at a compromise solution and a Bill embodying this was introduced into Parliament as a private member's measure in 1967. This died with the dissolution of Parliament but a similar Bill introduced in 1969, again by a private member, was passed, the Government ensuring that sufficient parliamentary time was allotted to it.

The Divorce Reform Act [6] received the Royal Assent on October 22, 1969 and is to come into force on January 1, 1971.[7] This delay is due to the fact that the Government promised, after a second reading had been given to a private member's Bill on matrimonial property,[8] that the Divorce Reform Act would not be in operation before the law on maintenance, and on certain property matters had also been reformed. These reforms are now embodied in the Matrimonial Proceedings and Property Act 1970. The Law Commission is at present working on more thoroughgoing reform of the matrimonial property laws.

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[1] Such as *Perry* v. *Perry* [1963] 3 All E.R. 766 (on constructive desertion) and *Williams* v. *Williams* [1966] 2 All E.R. 614 (on the exercise of the court's discretion). Also the cases on condonation noted in note 42.

[2] On cruelty, *Gollins* v. *Gollins* [1963] 2 All E.R. 966; *Williams* v. *Williams* [1963] 2 All E.R. 994; *Kelly* v. *Kelly* [1968] 1 W.L.R. 152. On collusion, *Head* v. *Cox* [1964] 1 All E.R. 776; See also *Tumath* v. *Tumath* [1970] 1 All E.R. 111.

[3] Report of the Royal Commission on Marriage and Divorce 1951–1955 (Cmnd. 9678).

[4] *Putting Asunder* (S.P.C.K., 1966).

[5] *Reform of the Grounds of Divorce—The Field of Choice* (Cmnd. 3123).

[6] [1969] Ch. 55.

[7] s. 11 (3).

As has been noted, the principle behind the Act represents a compromise between the views expressed in *Putting Asunder* and those of the Law Commission.[9] The Archbishop's Committee favoured the substitution of irretrievable breakdown of marriage instead of the traditional offences as the sole ground for divorce. They felt that breakdown was a justiciable issue.[10] The Law Commission approved of the Church's opposition to exclusive reliance on the matrimonial offence, but considered that it would be procedurally impractical, and often undesirable, to require an inquest in all divorce cases in order to prove the breakdown of the marriage.[11] The Commission put forward three proposals which it considered practical and in accord with public feeling on the matter, from which a choice could be made by society. Divorce could be granted (a) solely on proof of breakdown without inquest (*i.e.* on proof of a period of separation which would have to be short if this were to be the sole ground of divorce), or (b) by consent of the spouses, or (c) on proof of a period of separation without regard to fault. The last two grounds would be combined with the existing " offence " grounds for divorce.[12] The compromise embodied in the Act is the adoption of the basic position of the Archbishop's Committee, making breakdown of marriage the sole ground of divorce, but, in order to prove breakdown, the petitioner must prove either the commission of a matrimonial offence (adultery, " cruelty," desertion), or that the parties have lived separately for two years (with consent to the decree) or five years. Thus the matrimonial offence or separation is used as evidence, but not conclusive evidence, that a marriage has broken down.

A. THE PROVISIONS OF THE ACT

The " sole ground " on which a petition for divorce will be granted is that the " marriage has broken down irretrievably." [13] Breakdown will be held to exist only where the petitioner " satisfies " the court of one of the five facts or conditions listed in section 2 (1). The court must inquire into any facts alleged by the petitioner or respondent. The burden and standard of proof remain unchanged by the Act. Previous doubts as to the standard of proof, especially in relation to adultery, were due partly to the use of the same word, " satisfied," in section 5 (3) of the Matrimonial Causes Act 1965 and therefore have not been resolved by this Act.[14] It seems unlikely that the conduct of divorce proceedings in relation to the proof of the basic conditions of breakdown will differ from proceedings under the old law. It must be emphasised that the Act does *not* require proof that the existence of one of the five conditions was a *cause* of the marriage breakdown. Indeed it is widely accepted that matrimonial offences or separation are generally a symptom not a cause of breakdown. The difference between proceedings under the old law and under the new Act is that under the latter the petitioner will in effect have the burden of proving an additional fact, namely that the marriage has irretrievably broken down. This will be further considered after the five basic conditions of breakdown have been examined in more detail.

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[8] On January 24 1969, sponsored by Mr. Edward Bishop M.P.

[9] For discussions of the issues raised see (1967) 30 M.L.R. 180 (Prof. Kahn-Freund), and (1967) 30 M.L.R. 121 ("Divorce by Consent and Divorce for Breakdown of Marriage" by Sir B. Mackenna). On the varieties of "breakdown" grounds for divorce adopted in the U.S.A. see 52 Virginia L.Rev. 32.

[10] *Putting Asunder*, para. 62 (d).

[11] *The Field of Choice*, paras. 58 *et seq.*

[12] *Ibid.*, p. 54.

[13] s. 1.

(1) *Adultery*

The petitioner must prove that the " respondent has committed adultery and that the petitioner finds it intolerable to live with " him.[15] The old law on the elements of the " offence " of adultery and its proof is thus unaltered. However, in addition to proving adultery, the petitioner must prove that he finds life with the respondent intolerable. (He must also prove that the marriage has irretrievably broken down, which, in this context, seems rather superfluous.) The test is subjective, no reference being made to whether or not a *reasonable* petitioner would find life intolerable. The petitioner does not, on the wording of the Act, have to prove that he finds life with the respondent intolerable *as a consequence* of his adultery. It has thus been suggested that this requirement will not in fact cause any change in practice for the court will have to accept the petitioner's word that he cannot continue to live with the respondent.[16] However, it should be possible to show by other evidence that the petitioner has left the respondent not because he finds their life together intolerable, but for some other reason. One fact that would tend to show this is a continuation or resumption of cohabitation after the discovery of the adultery, but this is specifically dealt with under section 3 (3) of the Act whereby less than six months' cohabitation is to be disregarded and more than six months bars divorce on the basis of that adultery. But facts other than a continuation of cohabitation might lead the court to find that a petitioner did not find life with his spouse intolerable. Suppose that a husband commits adultery. His wife forgives him and they continue to live together. Before six months elapse she leaves him because she has met a wealthy man she would like to marry, or because she wants to live with a married daughter despite the fact that her husband does not. She petitions for divorce on the basis of her husband's adultery. Even if she says that she finds life with him intolerable, it would seem to be quite open to the court to hold that, even disregarding the period during which they lived together after the adultery, other evidence suggests that she does not really find life with her husband intolerable (a strong word); she is merely attracted to another mode of life. I suggest that in this situation the proper course for the court would be to adjourn the proceedings to enable reconciliation attempts to be made under section 3 (2). Obviously the answer to this kind of case will depend on how seriously the courts will regard their duty to investigate all the facts alleged by the parties.

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[14] See *Preston Jones* v. *Preston Jones* [1951] 1 All E.R. 124; *Blyth* v. *Blyth* [1966] 2 All E.R. 817. It seems that the civil standard should now apply, as a result of the Family Law Reform Act 1969, s. 26 relating to the proof of paternity.

[15] s. 2 (1) (*a*). It has been pointed out to me by Dr. Naomi Michaels that the words " since the celebration of the marriage " have been omitted from s. 2 of the Act, though they were present in the original Bill. This was done in committee in the House of Lords. Lord Dilhorne was anxious lest these words would be applied to s. 2 (1) (*b*) to indicate that the respondent's behaviour must date from the beginning of the marriage. Thus it is possible that adultery committed by the respondent *before* marriage could be used as a basis for divorce. In s. 3 (3) of the Act it is however enacted that " where the parties . . . have lived with each other for any period or periods after it became known to the petitioner that the respondent had, *since the celebration of the marriage*, committed adultery," then provided the period was less than six months it shall be disregarded.

(2) *Behaviour terminating the duty to cohabit*

The second fact that will be evidence of matrimonial breakdown is that the "respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with" him (which, for brevity, I shall call objectionable behaviour).[17] This is primarily designed to cover cruelty as defined in *Gollins* v. *Gollins*[18] and *Williams* v. *Williams*,[19] except that there is no need under the Act to prove injury to health[20] though this was not a *statutory* requirement under the old law either. This formula will also obviously cover constructive desertion and the old statutory grounds of insanity and, for a wife, rape, sodomy, and bestiality. Will this formula cover any other type of conduct? It is certainly arguable that adultery itself could come within its terms, and that this might be a device whereby the need to prove life with the petitioner intolerable could be avoided. More important, perhaps, this might be a way round the provisions of section 3 (3) (*b*) which makes cohabitation for over six months after the petitioner knew of the respondent's adultery a bar to a divorce based on that adultery. This "absolute bar" does not apply in cases based on section 2 (1) (*b*) or (*c*). There already exists a precedent under the present law which shows that the courts do not look unfavourably on the practice of using an act of adultery as evidence of cruelty in order to avoid the rule that adultery, once condoned, cannot be revived.[21]

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[16] See Passingham, *The Divorce Reform Act 1969*, p. 8.

[17] s. 2 (1) (*b*).

[18] [1964] A.C. 644.

[19] [1964] A.C. 698.

[20] H.C.Deb., Vol. 784, col. 1909 (1969).

The test of objectionable behaviour should not be entirely objective despite the use of the word "reasonable." The wording in the Act is based on that of their Lordships in *Gollins* v. *Gollins*. Lord Pearce, for example, said that cruelty was established "if a reasonable person, after taking due account of the temperament and all the other particular circumstances, would consider that the conduct complained of is such that this person should not be called upon to endure it." [22] Under the Act the behaviour must be such that the petitioner, not the reasonable petitioner, cannot be expected to endure. The court will be able to take into account any unusual susceptibilities of the petitioner.

(3) *Separation*

Three types of separation will be evidence of breakdown. First, the old matrimonial offence of desertion, that is separation without cause [23] or consent and with the intention of remaining permanently apart, is preserved though the period of separation is reduced from three to two years.[24] The provisions of the Matrimonial Causes Act 1965, s. 1 (2) relating to the continuation of the intention to desert where the respondent becomes insane are re-enacted.[25] Secondly, living apart for two years with the consent of the respondent to the decree and, third, living apart for five years are both facts from which breakdown may be proved. These are the new "non-fault" conditions for divorce. The petitioner is not barred from obtaining a decree even though he is mainly responsible for the separation (though this may be modified by whatever interpretation is adopted of section 4 in relation to five years' separation [26]). It is the plight of the middle-aged wife who is divorced against her will by a husband who has been living with another woman for five years that has caused much of the controversy over this Act and has given rise to its misleading epithet, "Casanova's Charter."

Both conditions require the parties to have lived apart for the stated term. This is amplified in section 2 (5) which states that "a husband and wife shall be treated as living apart unless they are living with each other in the same household." An intention to separate permanently is not mentioned but unless it is proved it will not be possible to prove that the marriage has irretrievably broken down. However, no provision is made in the Act for the case where one or both of the spouses become insane after separation and can therefore have no intentions about its permanency.[27] Neither is any guidance given to the court in cases where the initiation of the separation was for reasons other than matrimonial breakdown but was then converted by the spouses into a final parting. If a husband lives apart from his wife for business or health reasons, or because he is called up for military service or imprisoned, and a year later he or his wife, or both of them, decide never to resume living together, does this year count towards the final two- or five-year period or will the period start to run only when the intent to bring matrimonial life to an end is formed? This problem has faced many American state courts with similar grounds for divorce [28] and in general the latter solution seems to be preferred. In Australia the question arose in *Macrae* v. *Macrae*.[29] A husband and wife lived in different houses from 1957. Both were trying to find a matrimonial home and both, having found one they each considered suitable, petitioned for restitution of conjugal rights. They never again lived together and, on appeal, it was held that the separation had begun in 1957. It seems that under our Act it is not necessary to prove that the marriage had broken down for the whole period of separation, but only at the date of the hearing, so the Australian example will presumably be followed. The existence of a judicial separation will not prevent the grant of a divorce decree after the required period of separation, even where the petitioner was the unsuccessful respondent to the judicial separation.[30]

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[21] See *Chalcroft* v. *Chalcroft* [1969] 3 All E.R. 1172.

[22] [1963] 2 All E.R. 966, p. 992.

[23] The words "without cause," used in the Matrimonial Causes Act 1965, s. 1 (1) (*a*), are omitted from this Act but this cannot alter the basic requirements of desertion.

[24] s. 2 (1) (*c*).

[25] s. 2 (4).

[26] See *post*, p. 641.

A problem which arises in connection with section 2 (1) (*d*) relates to the consent of the respondent. In the original Bill the respondent's consent was not required, but if he objected a decree would not be granted. This was changed in order to provide greater safeguards for the respondent. He must now consent to the decree and under section 2 (6) rules of court have been made which require that general information of the consequences of his consenting to a divorce is given to him. A decree nisi may be rescinded if the respondent was misled by the petitioner, either intentionally or unintentionally, on any matter which he took into account before giving his consent.[31] The interests of the consenting respondent therefore seem to be reasonably well protected. The Rules permit the respondent to withdraw his consent at any time and the proceedings will be stayed.[32] Withdrawal of consent at the hearing would thus appear to be effective. This might cause a considerable waste of the petitioner's time, energy and money and also produce uncertainty. The threat to revoke consent might also be used as a form of blackmail to obtain generous property settlements. In countries with similar provisions it is necessary to show that the respondent agreed to the actual separation and that this agreement has remained " in full force " or " has been substantially performed " for the required period.[33] Consent to the grant of the decree is not required. This type of provision can lead to problems which are neatly avoided by our Act. For example, where consent to the separation need only be given informally, then there may be difficulties of proof, both of whether consent was actually given and, if so, at which point in time. How far could mere silence or inaction indicate consent? In New York a formal written separation agreement must be made and filed in the county clerk's office. A divorce may be granted after two years provided the agreement has been substantially performed by the petitioner.[34] Such formality requires foresight, increases legal costs and is detrimental to prospects of reconciliation. The provisions of the Divorce Reform Act have the virtue that only two comparatively simple facts need be proved, namely, continuous separation for two years and consent to the decree, but a withdrawal of consent at the last minute could cause injustice.

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[27] s. 2 (4) is confined to intention in desertion.

[28] Ten states have broadly similar provisions to s. 2 (1) (*d*) or (*e*)—Alabama, Arkansas, Arizona, Idaho, Kentucky, Louisiana, Puerto Rico, Texas, Virginia, Washington. See 52 Virginia L.Rev. 32.

[29] (1967) 9 F.L.R. 441.

[30] In New York there are conflicting decisions on whether a "guilty" spouse can after two years convert into a divorce a judicial separation obtained by an "innocent" spouse. See *Church* v. *Church*, 296 N.Y.S. 2d 716 (1968); *Shapiro* v. *Shapiro*, 298 N.Y.S. 2d 785 (1969); *Hendel* v. *Hendel*, 300 N.Y.S. 2d 850 (1969).

(4) *Other evidence of breakdown*

If the petitioner satisfies the court that one of the five conditions is established, then " unless [the court] is satisfied on all the evidence that the marriage has *not* broken down irretrievably, it shall . . . grant a decree nisi of divorce." [35] This is a rather curiously worded section. It almost implies that there is a presumption that the marriage has broken down if one of the five conditions is established, and that therefore a divorce must be granted unless there is evidence to the contrary. The court has a duty under section 2 (2) to inquire into the facts alleged by the parties " so far as it reasonably can," but it has no statutory duty to search for evidence of facts that neither side have alleged. It is thought by some that the courts will not inquire any more deeply into the marriage than they do at present.[36] The Law Commission hoped that the present formula would avoid the need for a detailed inquest on the marriage, which would be costly, lengthy and embarrassing, but, despite the guarded wording in section 2 (3), it does not seem that this will necessarily be achieved. The court does have to be satisfied that the marriage has broken down—this is, after all, the " sole ground " of divorce. Some solicitors fear that the court will not be satisfied of this unless the petitioner produces evidence of a " failed " reconciliation attempt. They contemplate sending all their clients to a marriage guidance worker or similar as an essential preliminary to the institution of proceedings. This would be most undesirable and wasteful. It would also be undesirable if parting couples were inhibited from behaving towards one another in a reasonably civilised manner because of a fear that the court might interpret their conduct as indicating that the marriage had not broken down. It is hoped therefore that in most cases the court will be prepared to accept the parties' word that the marriage has ended.

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[31] s. 6. Being misled by anybody other than the petitioner, such as a solicitor, does not come within the ambit of this section.

[32] Matrimonial Causes (Amendment No. 3) Rules 1970 (S.I. 1970 No. 1849), r. 11.

[33] As in New Zealand—Divorce and Matrimonial Causes Act 1928, s. 10 (1), and New York—Domestic Relations Law, § 170 (5).

[34] McKinney, *Consolidated Laws of New York*, Cum.Supp. to Vol. 14, p. 50.

[35] s. 2 (3). My italics.

B. GROUNDS ON WHICH A DECREE MAY BE REFUSED

Under section 9 all the old bars, condonation, connivance, collusion, the petitioner's misconduct etc., contained in the Matrimonial Causes Act 1965, s. 5, are abolished. However, facts which established these bars under the old law, especially condonation and delay in petitioning, might indicate that the marriage had not irretrievably broken down. Other bars, such as connivance or the petitioner's misconduct are more likely to reinforce the petitioner's contention that the marriage has broken down. Even where the parties wilfully attempt to deceive the court, no power is given in the Act to rescind the decree nisi. This may at first sight appear surprising. However it must be remembered that if, before a decree absolute is granted, the court finds that in fact none of the five conditions in section 2 (1) are satisfied then obviously no decree will be granted for that reason. If, on the other hand, one of the conditions is satisfied and the marriage has broken down but the petitioner has in some way tried to deceive the court, then a divorce should be granted. It would be contrary to the entire philosophy of the Act to refuse to " bury " a dead marriage in order to punish a spouse's attempt to deceive the court.[37] Proceedings for contempt or perjury are designed for this.

(1) *Cohabitation under section 3*

In place of the old bars there are new defences or bars that can be raised. First, what amounts to a quasi-condonation (though the word condonation is not used in the Act) is retained in section 3.

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[36] See George G. Brown (1970) 120 New L.J. 341.

[37] See on this Prof. Kahn-Freund's comment in (1967) 30 M.L.R. 180, 183.

The aim of these provisions is to encourage reconciliation rather than to bar divorce. In the case of adultery, if the spouses lived together for any period or periods of up to six months after the petitioner discovered the respondent's adultery, then that cohabitation *must* be disregarded by the court for the purpose of deciding whether or not the petitioner finds life with the respondent intolerable. To live together for more than six months in these circumstances means, however, that the adultery cannot be relied on for the purposes of obtaining a divorce decree under section 2 (1) (*a*).[38] Thus an absolute bar to divorce is created. Similarly, periods of cohabitation of up to six months are to be disregarded in determining whether, under section 2 (1) (*b*) the petitioner can be reasonably expected to live with the respondent,[39] and, under section 2 (1) (*c*), in determining whether the period for which the respondent has deserted the petitioner is continuous,[40] though the actual periods during which the parties lived together are not to be counted as part of the two years' desertion. In the case of objectionable behaviour, there is no provision that more than six months' cohabitation will bar a decree based on that conduct. Here, therefore, it is open to the court to find that in fact the marriage has irretrievably broken down despite cohabitation of over six months. A period of desertion would, of necessity, be terminated by cohabitation of more than six months. " Living together " is defined as living in the same household.[41] There is no need to prove that the spouses lived together " with a view to reconciliation " as under the Matrimonial Causes Act 1965, s. 42. This Act therefore abolishes the old " concept " of condonation and its obscurities which in recent years have become amazingly legalistic and remote from the realities of life.[42] However, it may be doubted whether as regards adultery, where more than six months living together absolutely bars a decree, the law has been liberalised. Under the old law, proof that the parties were living together in the same household did not itself mean that condonation was established. This was especially true where a wife *continued* to cohabit with an adulterous husband. She would be given time to review her position and the court would take into account the fact that she might be forced to stay with him by economic or other necessity.[43] Where there was a *resumption* of cohabitation, there arose a presumption of cohabitation which was very difficult to disprove,[44] though it was not impossible.[45] The new bar arises where the parties live together in the same household for more than six months, whether this is a continuation or a resumption of cohabitation. Questions of reinstatement and forgiveness, relevant to condonation, are irrelevant here. Thus a period of cohabitation which might not have amounted to condonation under the old law, will bar divorce under the new. A possible example of such a case would be where a wife, having found out that her husband has committed adultery, decides to end the marriage, but agrees with her husband that they will continue to live together " in the same household " until, for example, the necessary property arrangements can be made, or until a child has taken a public examination or recovered from an illness. If she delays leaving for over six months, she loses her chance of a divorce based on that adultery (and may even put herself in desertion). Under the old law there was at least a reasonable chance that this cohabitation would not amount to condonation especially where the wife had made her position clear to the husband from the beginning. The wife in this case would now be well advised to argue that the adultery was objectionable conduct under section 2 (1) (*b*) and that the cohabitation did not establish that she could be reasonably expected to live with her husband.[46]

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[38] s. 3 (3). *One* period of cohabitation of up to three months was permitted under the M.C.A. 1965, s. 42.

[39] s. 3 (4).

[40] s. 3 (5).

[41] s. 3 (6).

[42] See for example, *Ives* v. *Ives* [1967] 3 All E.R. 79; *Quinn* v. *Quinn* [1969] 3 All E.R. 1212; *Hearn* v. *Hearn* [1969] 3 All E.R. 417. Also, on M.C.A. 1965, s. 42, *Brown* v. *Brown* [1964] 2 All E.R. 828; *Herridge* v. *Herridge* [1966] 1 All E.R. 93.

[43] *Burch* v. *Burch* [1958] 1 All E.R. 848. See Bromley, *Family Law* (3rd ed.), p. 188.

(2) *Financial and other hardship under section 4*

This defence applies only to decrees sought on the basis of five years' separation (section 2 (1) (*e*)), where, on the face of it, an " innocent " spouse may be divorced against his or her will. How far this will be the situation depends on what interpretation is given to section 4 by the courts. Under section 4 a respondent may oppose a decree under section 2 (1) (*e*) on the ground that the dissolution of the marriage would cause " grave financial or other hardship to him *and* that it would in all the circumstances be wrong to dissolve the marriage." The court *must* refuse the decree if (a) it is satisfied that the only fact upon which the petitioner is entitled to a decree is that of five years' separation (which means in effect that it is satisfied that the respondent has not committed any adultery, objectionable behaviour and is not in desertion) and (b) that, having regard to all the circumstances, including the conduct of the parties, their interests and those of any children or other persons involved, the dissolution of the marriage would cause the hardship stated above. The section is thus mandatory, but of course ample discretion may be exercised by the court when it decides whether or not such hardship will be caused by the divorce. It is notable that the public interest in upholding the institution of marriage is not included amongst the criteria that the court must consider. How will this section operate? Grave financial hardship may be easily recognised. It includes the loss of the chance of acquiring benefits which might have accrued had the marriage continued, such as pension or insurance rights.[47] But what is " other hardship " and how is the court to determine whether or not it would be " wrong " to dissolve the marriage? No further guidance is given in the Act. A similar, though perhaps stronger, provision is to be found in the Australian Matrimonial Causes Act 1959, s. 37 (1) which enacts " where . . . the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation began, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree, the court shall refuse to make the decree sought." (Financial hardship is separately dealt with under section 37 (2).) The judicial attitude leans firmly in favour of divorce. In *Painter* v. *Painter* [48] it was denied that the respondent's religious objections to divorce would make the grant of a decree harsh and oppressive. Such a respondent could still regard himself as unfree to marry despite the decree. Neither has the social stigma attached to divorce been sufficient cause to refuse a decree (*McDonald* v. *McDonald*).[49] It was also pointed out in this case that the section was not designed to refuse decrees to petitioners because of their own misconduct or lack of merit. It was designed for the protection of the respondent.[50]

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[44] Especially so in the light of *Hearn* v. *Hearn* [1969] 3 All E.R. 417 (though this is a Divisional Court case which has never been considered by the Court of Appeal or House of Lords).

[45] See *Swann* v. *Swann* [1953] 2 All E.R. 854; *Mackrell* v. *Mackrell* [1948] 2 All E.R. 858; *Ford* v. *Ford* [1970] 3 All E.R. 188.

[46] See *ante*, p. 636.

In New Zealand the court has a discretion to grant a divorce where the parties have lived apart for seven years. In *Newell* v. *Newell* [51] it was held that the fact that the separation was due to the petitioner's misconduct was not by itself a ground to refuse the decree. The judge [52] disagreed with an opinion expressed in a previous case, *Mason* v. *Mason*,[53] that the discretion should not be exercised in favour of a petitioner who had persisted in living in adultery despite the willingness of the respondent for a reconciliation. In *Newell* the petitioner had lived with the same woman for twenty years and this, said the judge, told in his favour rather than the reverse. Had he been of " loose moral habits throughout this period " then " the position would be far otherwise."

It would be contrary to the philosophy behind section 2 (1) (*e*),

[47] s. 4 (3).

[48] (1963) 4 F.L.R. 216.

[49] (1964) 64 S.R. (N.S.W.). 485.

[50] D. M. Selby in " The Development of Divorce Law in Australia " (1966) 29 M.L.R. 473 concludes that this provision has been a singularly ineffective safeguard.

[51] [1965] N.Z.L.R. 737.

[52] *Ibid.* at p. 740.

[53] [1921] N.Z.L.R. 955.

which is to abandon the matrimonial offence in favour of matrimonial breakdown, if fault were to creep in via section 4 so that a petitioner whose conduct was mainly responsible for the separation were to be refused a decree on the ground that it would cause "other hardship," in the form of injured dignity or an outraged sense of justice, and that it would be "wrong" to grant divorce because, for example, to grant it would permit the guilty to benefit from their own wrongdoing. It might have been better had the legislature given the courts clearer guidelines under this section and stated that the guilt of the petitioner was not by itself a ground for refusing a decree. This, however, would probably have been politically inexpedient.[54] It is difficult to envisage what grave hardship, other than financial hardship, could result from the grant of a divorce if injuries to feelings, religious beliefs or social status are excluded. Section 4 speaks in terms of hardship to the respondent only and therefore, even if it could be established that hardship to the children would be caused by the divorce (which is doubtful), it would seem that a decree could not be refused on that ground. The fact is that most hardship, including financial hardship, is caused by the fact of matrimonial breakdown, which the courts are powerless to prevent, and not by the grant of a divorce decree.

C. Provisions for Reconciliation

Under the Matrimonial Causes Act 1965 the only provision directly concerned with reconciliation was contained in section 2, which required the court to consider the possibility of reconciliation where there was an application to present a divorce petition within the first three years of marriage.[55] The provisions in the new Act are based on those operating in Australia. Under section 3 a solicitor must certify whether or not he has discussed reconciliation with the petitioner and given him details of persons qualified to help in this.[56] Under section 3 (2) the court may adjourn the proceedings at any stage if it appears that there is a reasonable prospect of reconciliation. The only other provisions designed to encourage reconciliation are those relating to cohabitation for up to six months which have been referred to already.[57] It can be seen therefore that these provisions are rather meagre. Additional provisions exist in Australia whereby all ancillary relief, including full details of the parties' financial resources and needs and the position of the children, must be set out in the petition for divorce. A compulsory conference must take place between the parties to try to settle these matters. The aim is to slow up the pre-trial proceedings to ensure that the spouses are not acting in haste and fully appreciate the seriousness of the prospect of divorce.[58] The Australian Act also provides for marriage guidance institutions to be approved by the Attorney-General and for making financial grants to them.

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[54] Many writers have pointed out the need for precise guidelines when enacting this kind of discretionary power. See (1969) 18 I.C.L.Q. 893, 927–979; 52 Virginia L.Rev. 32, 35 (Prof. W. Wadlington). See also, ironically, the Law Commission, *Field of Choice*, para. 115, where they point out how necessary are clear guidelines in view of the "great number of different judges—High Court Judges, County Court Judges, and Special Commissioners" who exercise divorce jurisdiction.

[55] This provision is unaffected by the new Act. Under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 62, a reconciliation attempt may be ordered by the court and report of it given in evidence.

[56] The Act does not therefore require a solicitor to discuss reconciliation but merely to certify *whether* he has or not. However if he has not the likelihood is that the court would adjourn the proceedings for a reconciliation attempt to be made (s. 3 (2)).

Some other jurisdictions, notably New York, have adopted more rigorous reconciliation requirements. There, conciliation bureaux have been set up in each judicial district and a complicated process, which includes an initial conciliation conference and a final conciliation hearing which is, in effect, a trial, must be undertaken by the parties unless the conciliation commissioner issues a certificate of "no necessity" for this. No action for divorce will be entertained unless the certificate is acquired, or the conciliation process undertaken, or 120 days have elapsed since filing the suit.

Should the English provisions be strengthened? All the evidence seems to show that reconciliation procedures undertaken at a time when one or both of the spouses have decided to petition for divorce achieve very little. In New York it is estimated that only 8 per cent. of the cases filed with the reconciliation bureaux in their first year of operation have led to reconciliation and that the same result would probably have occurred without the aid of the bureaux. The procedures have the undesirable effect of prolonging divorce proceedings, and adding to their expense which causes particular distress to the poor.[59] It has been said that in Australia only twelve cases were referred by the courts to marriage guidance institutions between 1961 and 1969 and only two of these resulted in reconciliation.[60] The Law Commission consider that conciliation procedure started after the filing of the suit achieved little success and "have tended to become pointless and troublesome formalities." [61] They recommended the provision contained in section 3 (1) not because they thought this would bring about reconciliations but because it would ensure that "all solicitors have ready to hand a list of marriage guidance organisations, so that this can be given to those clients who consult them at an earlier stage." [62] Thus more stringent provisions would be otiose, though the Australian provisions aimed at getting the parties to agree on ancillary matters might be advantageous.

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[57] See *ante*, p. 640.

[58] See (1966) 29 M.L.R. 473, D. M. Selby, "The Development of Divorce Law in Australia."

[59] See 5 *Columbia Journal of Law and Social Problems* 1 (August 1969).

[60] (1969) 18 I.C.L.Q. 896, 909.

[61] *Field of Choice*, para. 80.

[62] *Ibid.* para. 81.

D. Other Matters

(1) *Financial protection in petitions based on section 2 (1) (d) and (e)*

Where a decree nisi has been granted on the basis of separation, the respondent may ask the court to consider his or her financial position after divorce. The court " shall not " make the decree absolute unless satisfied either that the petitioner should not be required to make any financial provision for the respondent, or that the financial provision made is " reasonable and fair and the best that can be made in the circumstances." [63] If it is desirable to expedite the decree absolute, or if the petitioner has given an undertaking to make such financial provision as the court may approve, then a decree may be granted without observing the provisions of section 6.[64] The court, under this section, must consider " all the circumstances, including the age, health, conduct, earning capacity, financial resources " and obligations of both parties, including the loss of expectancies such as pension rights should the petitioner predecease the respondent. This section does not provide a defence to divorce, as does section 4. It is designed to ensure that no final decree is granted until proper financial arrangements have been made. It is thus similar to section 33 of the Matrimonial Causes Act 1965 [65] which prohibited the grant of a decree absolute until satisfactory arangements were made for the children. The main difference between the two is that section 6 is only applicable where the respondent invokes it, whereas section 33 applied automatically in all cases. Thus the question of whether a decree absolute granted in disregard of section 6 is void is unlikely to arise, and in fact is not dealt with under the Act.[66] Under section 6 the court could in theory require a petitioner to make an arrangement that it could not *order* him to make under the Matrimonial Proceedings and Property Act 1970, though the court does in fact have wide powers under that Act to award lump sums and order the transfer of property. It cannot directly force the petitioner to make such arrangements, but only withhold a decree absolute until he does make them. The section will obviously be of most assistance to the respondent to a decree based on five years' separation who does not wish to oppose the decree as such but who wishes to obtain the best property arrangements possible before a decree is granted.

(2) *Agreements between spouses*

Collusion is abolished [67] but the Act still makes provision for referring to the court any agreements made or proposed between the parties. The court may then "express an opinion" on the reasonableness of the agreement and give such directions as it thinks fit.[44] An agreement *need* not be referred to the court and the existence of any agreement that in the past would have been collusive will not bar the decree. Obviously if the parties agree, for example, not to raise a certain defence, then it would be prudent to ask the court's opinion of such an agreement at an early stage rather than run the risk of the court deciding that further investigations are necessary at a later stage. The court will also be able to approve agreements on property, maintenance and children under this section and thus these matters will not hold up the decree at a later stage.

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[63] s. 6 (1) and (2).
[64] s. 6 (3).
[65] Now, Matrimonial Proceedings and Property Act 1970, s. 17.
[66] Under s. 17 of the Matrimonial Proceedings and Property Act a decree granted in disregard of the section is void.
[67] s. 9 (3).

(8) *Children*

A decree absolute is generally void unless the court has made an order indicating that it is satisfied with the arrangements made for any child of the family. This provision appears in the Matrimonial Proceedings and Property Act 1970, s. 17 which replaces, with some modifications, section 33 of the Matrimonial Causes Act 1965. Surprisingly the Divorce Reform Act does not mention children, except under section 4 where in considering whether or not to grant a divorce for five years' separation the court must consider the interests of "any children." Many will consider that this lack of provision reflects a strange sense of priorities for the persons most obviously "innocent" and "at risk" in divorce cases are the children. Mr. John Hall has stated that ". . . the gravity of the consequences for the child of the disruption of the marriage must be made quite clear to the parents and they must be left in no doubt that in consequence they now bear a special responsibility to the child." He considers that, "Perhaps the greatest weakness of the present procedure is that it sometimes gives the impression of superficiality."[45] Some of his suggestions could be adopted by rules of court. He concludes, however, that it is impractical for the court to try to supervise the children's upbringing after the decree absolute has been granted. Parents will have to be trusted. One method by which a responsible attitude on the part of parents could be encouraged would be to require them to certify before the petition for divorce is filed that the matter has been fully discussed by them, with the help, if necessary, of a welfare or child care worker, and that any arrangements agreed upon are the best that can be made in the circumstances. The court must do all that it can to ensure that, at the date of the decree, the children are as well housed, maintained and looked after as possible. But, of course, the court is unable to prevent the harm that will often be caused to children by the breaking of their parents' marriage.

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[44] s. 7. This is similar to Matrimonial Causes Act 1965, s. 5 (2).

[45] Law Commission Working Paper No. 15, Arrangements for the care and upbringing of Children. Report by John Hall (1968), pp. 37 and 38.

E. The Effect of the Act in Practice

Will the passing of this Act cause a rise in the divorce rate? It is not possible here to analyse the divorce statistics with a view to determining the factors that produce a high divorce rate, a complex matter about which there is much conflict of opinion. However, evidence can be produced to show that, " in so far as it is possible to separate the factors involved, the humanisation of divorce laws does not necessarily contribute appreciably to a rise in the divorce rate." [70] High divorce rates are associated primarily with sudden social changes, such as recent urbanisation and with high social mobility. Low divorce rates often reflect the strength of religious pressures within a society. Thus it is probable that if the divorce rate does show a consistent increase this will be due to social changes rather than legal changes.[71] An initial increase in the divorce rate can be expected as many persons who, under the old law, were unable to obtain a divorce will now be able to do so. In 1966 the Law Commission estimated that if present " stable irregular unions " were regularised, 180,000 living illegitimate children would be legitimated.[72] This does not mean, of course, that 180,000 couples would be divorced and one or both spouses marry their " irregular " partners as there will be more than one illegitimate child of many of these unions. However, the Law Commission's estimate concerns only children under sixteen. There must be a number of stable unions where there are no children or where the children are over sixteen.

It can be anticipated that the grounds upon which divorce is asked for will change in popularity. In view of the fact that 98 per cent. of divorces are now undefended, two years' separation with consent to the decree should prove a most popular ground. In New Zealand (where the period is three years) it has been estimated that 50 per cent. of all undefended divorces are obtained on this ground. However, experience in Australia and America has tended to show that, given the choice, an offence ground of divorce will be preferred to that of a period of separation. In Australia separation is required for the lengthy period of 5 years, and desertion and adultery remain the favourite grounds of divorce, separation coming third. Cruelty appears not to be particularly favoured as a ground in Australia though it has not decreased in popularity since the introduction of the separation ground. In the U.S.A., where of course numerous different divorce laws prevail, cruelty is the most popular ground, accounting for about 50–60 per cent. of all divorces.[73] This is thought to be due to the fact that in many states the concept of cruelty is widely interpreted. If the English courts do interpret section 2 (1) (*b*) liberally it may be expected to be a popular basis for divorce.[74]

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[70] Prof. M. G. Marwick " The Comparative Sociology of Divorce " in *Divorce, Society and the Law*, Edited by H. A. Finlay, p. 105.

[71] In Australia the divorce rate since 1961, when the law was " liberalised," has increased but not more than would have been expected without any change in the law. See Law Commission, *Field of Choice*, Appendix E.

[72] *Field of Choice*, para. 36.

[73] Jacobson, *American Marriage and Divorce* (1959), p. 122.

Will the element of fault decline in importance? If separation does become the favourite ground then this will obviously be so. Many dead marriages will thus be buried with more decency and less embarrassment than under the present law. How far fault will be relevant as a defence to a divorce for five years' separation is a matter of conjecture. The element of fault will still be present where adultery, objectionable conduct or desertion is alleged and it will still be relevant in ancillary matters. Under section 5 of the Matrimonial Proceedings and Property Act 1970 the court has still to concern itself with the conduct of the parties in determining what financial provision should be made. It must also be remembered that none of the recent legislation has changed the jurisdiction of the magistrates' courts. Thus in making separation and maintenance orders magistrates will still be concerned with all the old offences and the bars thereto. An anomaly that one hopes will be soon remedied.

JENNIFER LEVIN.*

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[74] In England in 1968, 12,758 petitions were filed on the ground of cruelty alone. The most common ground was adultery alone (26,011 petitions filed). Third came desertion alone with 11,147 petitions. Of decrees *granted* in 1968, cruelty alone came third (adultery 25,882, desertion 10,581, and cruelty 9,459). See Civil Judicial Statistics 1968, Table 11, pp. 60 and 64.

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CHILDREN WITHOUT A SATISFACTORY HOME—A GAP FAMILY LAW MUST FILL

PROVISION for the upbringing of a child deprived for one reason or another of a satisfactory family situation is one of the most intractable problems of family law, and one in which the social interest is evident. The Achilles' heel of this part of the law (and one of the most cogent justifications for the family as a social institution) is that so far no satisfactory substitute seems in sight for the reasonably functioning family, in its role of providing a growing child with the stable, loving and stimulating environment he needs for proper development.

There has been much recent legislative activity in this area. The Children and Young Persons Act 1969 [1] is the latest attempt to re-orientate the way in which we deal with children deprived of a normal family life. The Local Authority (Social Services) Act 1970 [2] will reorganise the local authority social services. The Family Law Reform Act 1969 [3] considerably amended the law regarding infants or minors.[4] It reduced the age of majority from twenty-one to eighteen years; removed from children born and remaining illegitimate their former disability to claim maintenance from a deceased parent's estate, or a child's share in the property left by a parent who died intestate, and included them in descriptions such as " child," or other words of relationship, in claims to succeed under a will. It also made new provisions for the administration of blood tests to prove paternity in civil proceedings.

We still call " illegitimate children " the normal children of parents who failed to ensure their birth in marriage or their subsequent legitimation or adoption. It is a fact of life that they form a disproportionately high percentage of those who, not having a stable family background, come under public care.

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[1] By s. 73 (2) the Act will be brought into operation by statutory instrument As the result of S.I. Nos. 1552 and 1565 of 1969, the following sections were in operation on or before January 7, 1970: ss. 35–45, 47–55, 57–60, 62 (2), 63–71 and parts of ss. 33 (1); 46, 56, 72 (1), (3) and (5). Some parts of the Schedules have also been made operative. As to s. 35, see note 54 *post*.

[2] c. 42. By s. 15 (4) the Act will be brought into operation by statutory instrument. None had been made by June 10, 1970. The Act was reviewed by Mrs. José Harries in (1970) 33 M.L.R. 580.

[3] c. 46. Parts I, II and IV of this Act came into force on January 1, 1970. Part III, dealing with blood tests, will be brought into operation when provision has been made for tests to be administered within easy reach of magistrates' courts.

[4] By the Family Law Reform Act 1969, s. 12 " A person who is not of full age may be described as a minor instead of as an infant, and accordingly in this Act 'minor' means such a person as aforesaid." The Administration of Justice Act 1970, Sched. 1 uses the term "minor," as does the Matrimonial Proceedings and Property Act 1970, *e.g.* in s. 17 (5) (*a*). But when not using its special vocabulary of "child" (under the age of 14) or "young person" (between the ages of 14 and 17 years) according to the Children and Young Persons Act 1933, s. 107, the "otherness" of the Children and Young Persons Act 1969 is emphasised by the use of the term "infant" *e.g.* in ss. 2 (3) (4) (5) and (8) to (14).

The Administration of Justice Act 1970 [5] reorganises the High Court and hands over to its new Family Division most of the jurisdiction regarding children formerly shared between the three divisions of Probate, Divorce and Admiralty, Chancery and Queen's Bench, but it does not touch the lower courts or affect the law regarding deprived children. The Matrimonial Proceedings and Property Act 1970 [6] increasing the powers of the divorce county courts and the High Court in regard to financial provision for "children of the family" involved in matrimonial causes, has little impact on deprived children. Traditionally it is the area of disputes between spouses and questions of "status" that have been thought to constitute the core of family law, and there is strong pressure to separate from it the law regarding deprived children.

The fact that the position of deprived children is still not considered satisfactory is demonstrated by the establishment of two further committees. One was appointed in July 1969 to consider the law, policy and procedure on the adoption of children, including questions arising from long-term fostering, and to recommend what changes are desirable.[7] The other was appointed in April 1970 to consider the problems of one-parent families.[8] Both these groups include large numbers of children needing public care or financial support.

Those in close touch with the problem realise that children who become delinquent because of family deprivation form a hard core of recidivist offenders whose cost to the community—even in purely financial terms—is immense. To add to the social costs of previous neglect of those now adult, the cost and necessary expertise for prophylaxis among the young is not easy, especially when there are grave doubts about the adequacy of public substitutes for family life for children.

The present position, even of the legislation, is far from satisfactory. It seems incomprehensible that the Children and Young Persons Acts 1932–69 should have been allowed to accumulate for almost forty years without any attempt at rationalisation or consolidation. The Children and Young Persons Act 1932, ss. 69 and 79 remain in operation,[9] but the principal Act is the Children and

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[5] c. 31.

[6] c. 45. By s. 43 (2), ss. 33, 36 to 41, 42 (2) and 43 came into operation on August 1, 1970. The remaining sections come into force on January 1, 1971.

[7] The Chairman of the committee is Sir William Houghton, Education Officer of the Inner London Education Authority (I.L.E.A.). Its provisional proposals were published as a working paper in October 1970.

[8] Under the chairmanship of Mr. Morris Finer, Q.C.

[9] Amending the Guardianship of Infants Act 1925, s. 6. S. 69 applies to Scotland. S. 79 will be repealed by s. 18 (2) to and Sched. 2 of the Guardianship of Minors Bill when enacted.

Young Persons Act 1933. This has been considerably amended, not only by the Children and Young Persons Acts 1938, 1956, 1963 and 1969 [10] and the Children and Young Persons (Amendment) Act 1952, but also by the Children Acts 1948 and 1958, Part I; the Education Act 1944, the Family Allowances Act 1945, the Magistrates' Courts Act 1952, the Family Allowances and National Insurance Act 1956, the Mental Health Act 1959 and, in the areas impinging on the criminal law, by the Criminal Justice Acts 1948, 1961 and 1967, the Criminal Justice Administration Acts 1956 and 1962, and the Sexual Offences Act 1956, as well as many minor amendments.

Whilst sympathising with the distinguished magistrate and sociologist in the House of Lords who failed to realise that section 1 (2) (*f*) of the Children and Young Persons Act 1969 must be read subject to the provisions of the Act of 1933, s. 50, as amended by the Act of 1963, s. 16, and with the Minister who clarified the matter by correspondence [11] we must have qualms for the educationally under-average children who are the objects of this legislative jungle, and for their parents and welfare workers who seek to advise them, usually without legal assistance.

Basically, two different but overlapping groups of children are covered by the Children and Young Persons Acts, *viz*:

(i) those who are neglected, ill-treated, not attending school, not being adequately cared for, or whose parents cannot provide a home for them, and

(ii) those who infringe the law.

The legislation regarding the first group is supplemented by the Children Act 1948 and Part I of the Children Act 1958, which establish: (a) the duty of the local authority to receive into its care children within its area whose parents or guardians are unable to care for them,[12] (b) the power of the local authority to vest in itself parental rights over those children already in its care whose parents [13] consent in writing, fail to object or are found by the juvenile court to be unfit to have care of the child,[14] and (c) the duty of the local authority to supervise children within its area whose care and maintenance are undertaken by a person who is neither a relative nor a guardian.[15] A major advance was the power given to the local authorities by the Children and Young Persons Act 1963,[16] s. 1 to take preventive measures by, *inter alia*, giving assistance to children in their own homes in kind or, in exceptional cases, in cash. This power is now one of the major levers used by social workers of the better local authorities to give help to keep families together, thus avoiding the misery, not to mention the public cost, of their disintegration.[17]

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[10] This latest instalment is a document containing 73 sections and seven schedules and comprises 126 and iv pages. It has already been amended in s. 3 (*b*), s. 6 and Sched. 4 by the Administration of Justice Act 1970, s. 51. See H.L. Deb., Vol. 302 (June 19, 1969).

[11] See H.L. Deb., Vol. 302 (June 19, 1969) cols. 1181–1182, Vol. 303, (July 7, 1969) cols. 766–767.

[12] Children Act 1948, s. 1. On possible conflict between s. 1 (2) and s. 1 (3) see *e.g. Krishnan* v. *Sutton L.B. Council* [1970] Ch. 181 (C.A.). On the interrelation between the two groups of statutes see *Re T.* (A. J. J.) (*An Infant*) [1970] 3 W.L.R. 315, (C.A.).

[13] For brevity the term "parent" is used to include guardian and relative having custody.

[14] Children Act 1948, s. 2. The terms on which the juvenile court may confirm the resolution under s. 2 (3) are noticeably more stringent than those on which a resolution may initially be taken.

The basic scheme of the Children and Young Persons Act 1969 (which I will refer to as the 1969 Act) is that Part I (ss. 1–34) covers court proceedings, care and supervision orders and detention of children and young persons; Part II (ss. 35–59) deals with the reorganisation of community homes and amendment of rules regarding foster children and local authority inspection, and Part III (ss. 60–73) covers miscellaneous and general matters.

As regards Part I of the Act, the proposal originally made in 1965 [18] was that, in an attempt to keep young people out of court, any person under the age of sixteen committing what would amount to a criminal offence in an older person, or in need of care, protection or control, would be brought before one of a number of family councils to be established in each local authority area. The council would endeavour to reach agreement with his parents on the treatment of the child. Only if the facts were in dispute or no agreement could be reached on treatment would the question be referred to a special magistrates' court, to be known as a family court, for determination. This scheme foundered, *inter alia*, because (a) it would be difficult to find adequate numbers of suitable people to form the proposed councils, especially since these would not have the status or authority of courts; (b) a non-co-operative parent would be able to delay treatment or appearance before a court by feigning co-operation, while the child's situation deteriorated; (c) there was, and still remains, opposition to any proposal to designate as family courts those principally concerned with the children deprived of a minimum standard of family support,[19] and (d) the police have an overall responsibility for the maintenance of law and order. They are understaffed and overstretched. The amount of time they can spend appearing before councils, tribunals or committees must in the public interest be limited.

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[15] Children Act 1958, Part I, ss. 1–17, as amended by the Children and Young Persons Act 1969, ss. 51–57.

[16] See (1964) 27 M.L.R. 61.

[17] See J. Handler, *New Society*, October 3, 1968.

[18] In Cmnd. 2742, *The Child, The Family and the Young Offender*. Similar proposals for Scotland were advanced by the Scottish Office in Cmnd. 3065 *Social Work and the Community*.

[19] See *e.g.* Scarman J., Chairman of the Law Commission, in *Family Law and Law Reform*, a public lecture delivered in the University of Bristol, March 18 1966, p. 11: "it would be really the wrong way round if the juvenile courts should first assume the name '*family court*' and then either take over or be confused with the *genuine* family courts that society needs for dealing with disputes that frequently have nothing whatever to do with *the criminal law*" (italics supplied).

A fresh report issued in 1968 [20] therefore made modified proposals, which form the basis of the 1969 Act. The guiding principles are: (a) to adopt a more "comprehensive" approach to the two groups of children with whom the legislation is concerned, and (b) to continue the policy of the Children Act 1948 in stressing the role of the local authorities in comparison with voluntary agencies. The new provisions represent a compromise between the existing procedure and the abolition of the juvenile courts, for which many reformers still press. In the debate in the House of Lords on the 1969 Act, Lady Wootton made the following points [21]: (a) children below school-leaving age should be dealt with entirely within the educational system; (b) children do not learn from strangers; (c) a child is marked by being taken to court; we make more delinquents in the waiting room than we ever cure in the court room, and (d) those who establish and staff juvenile courts do so for other people's children, and not for their own.

On the first point, a contrary view was expressed by an informed observer from overseas, who thought that once caught up in the social welfare nexus even of the 1969 Act, escape for a child under full age might prove difficult if not impossible. There is something to be said for alternative approaches, especially for a child. The "marking" of the child taken to court is made much more serious when we separate off the juvenile court from other lower courts, refuse to include it in any family court, and send appeals from it on the usual criminal appeal circuit.

The first rule adopted by Part I of the 1969 Act is that, for delinquent children, *viz.* those under the age of fourteen years, except for cases of homicide, care proceedings only [22] are applicable. For young people, *viz.* those between the ages of fourteen and seventeen years, who infringe the law, care proceedings will be normal, and the circumstances in which an information may be laid leading to criminal proceedings against them are rigorously circumscribed. An information may be laid only by a qualified informant,[23] only in respect of a class of cases to be specified by the Home Secretary in regulations approved in draft by a resolution of each House of

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[20] Cmnd. 3601, *Children in Trouble*.

[21] H.L. Deb., Vol. 302 (June 19, 1969), cols. 1186–1189.

[22] Under s. 1 of the 1969 Act. By s. 4 of the Act: "A person shall not be charged with an offence, except homicide, by reason of anything done or omitted while he was a child."

[23] Defined in s. 5 (9) as "a servant of the Crown, a police officer and a member of a designated police force acting in his capacity as such a servant, officer or member, a local authority, the Greater London Council, the council of a county district and any body designated as a public body for the purposes of this section" by order of the Secretary of State. Local authorities or other bodies may, however, act through an agent.

Parliament, and only when the informant is of opinion that it would not be adequate for the case to be dealt with by a parent, teacher or other person or by means of a caution from a constable or through an exercise of the powers of a local authority or other body not involving court proceedings, or by care proceedings.[24] The qualified informant must first tell the local authority that he is considering laying an information. He must also ask for the local authority's observations and allow reasonable time for them to be made; but he is entitled to disregard this requirement in any case he considers will be within the limits laid down notwithstanding any such observations.[25] This is an example of complications arising under the Act from extending the powers and responsibilities of local authorities, to which I will return. The qualified informant must lay his information in writing and certify that he has complied with the provisions of the Act or disregarded the requirement of awaiting the local authority's observations. On beginning their inquiry into a case, the magistrates must quash the information if it was not laid by a qualified informant, in writing, and with the necessary certificate.

Before a young person's fingerprints may be taken, a police officer not below the rank of inspector must give evidence on oath that evidence exists sufficiently to justify a charge for an offence punishable in an adult with imprisonment, and that fingerprinting is appropriate. The magistrate may then issue a summons or warrant for the young person to appear before the court, which may make the necessary order.[26]

Section 6 provides that a young person charged with an offence other than homicide must be tried summarily unless the offence falls within section 53 (2) of the Children and Young Persons Act 1933 [27] or the youngster is charged jointly with a person over seventeen years of age and the court considers both should be committed for trial.[28] Those under the age of seventeen can no longer claim jury trial.[29] The minimum age for Borstal training is raised again from fifteen to seventeen years.[30] By section 7 (7), any court finding a child guilty of homicide or a young person guilty of any offence is given power to make a care or supervision order in respect of him or order his parent or guardian, with their consent, to enter into recognisances for his proper care and control, but the power to remit cases to the juvenile court is not affected. The limitations on publication of details of juveniles brought before the courts for alleged offences are extended by section 10 to those between the ages of seventeen and eighteen years and, in respect of variation of supervision orders, to magistrates' courts other than juvenile courts and to appeal courts.

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[24] *Ibid.*, s. 5 (2).

[25] *Ibid.*, s. 5 (3). Such convoluted provisions look like the result of complex negotiations between the police on the one hand and the welfare authorities on the other. Since the informant must certify with his information whether he has complied with or disregarded the provisions of s. 5 (3), it should be possible to discover in a few years' time what differences of practice appear between different police forces.

[26] *Ibid.*, s. 8.

[27] *i.e.*, attempt to murder, manslaughter or wounding with intent to do grievous bodily harm, all offences punishable in an adult by imprisonment for fourteen years or more. On a trial for such offences the juvenile court may commit the juvenile for trial by quarter sessions, which may order his detention under the provisions of the 1933 Act.

[28] 1969 Act, ss. 6 (1) (a) (b).

[29] *Ibid.*, s. 6 (2), amending the Magistrates Courts Act 1952, s. 25.

[30] *Ibid.*, s. 7.

By section 1 (1) of the Act, only a local authority, constable or authorised person may bring the child or young person before the court under care proceedings. The local authority must bring care proceedings if there are grounds, unless satisfied that it is neither in the minor's nor the public interest, or that proceedings are being instituted by others.[31] The court must be satisfied that one or more of the following conditions is satisfied in relation to the child or young person[32]:

(a) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated, or
(b) since another court has found these conditions exist in respect of another member of his household, they probably exist in relation to him, or
(c) he is exposed to moral danger,[33] or
(d) he is beyond the control of his parent or guardian, or
(e) he is of school age and not receiving proper education, or
(f) he is guilty[34] of an offence, excluding homicide.

In addition to the existence of one or more of the above conditions, the court must also find in all cases that the person before it is in need of care or control which he is unlikely to receive unless the court makes an order.

If these conditions are satisfied, and if the young person is not over the age of sixteen years and is not and has not been married, the court may make one of the following orders (except that it may combine orders under items (iii) and (iv)):

(i) requiring his parent or guardian to enter into recognisances to take proper care of and exercise proper control over him, provided the parent or guardian consents,[35]

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[31] *Ibid.*, s. 2 (2).

[32] *Ibid.*, s. 1 (2).

[33] Examples are given in the Children and Young Persons Act 1933, s. 61 (1) (*a*) but without prejudice to the generality of the concept.

[34] Since the term "guilty" is used, this provision can apply only to children over the age of criminal responsibility, *viz.* over 10 years of age: Children and Young Persons Act 1933, s. 50, as amended by the Act of 1963, s. 16. See note 11 *ante*.

[35] s. 1 (3) (*a*).

(ii) placing him under the supervision of the local authority (*viz.* a supervision order),[36]

(iii) placing him in the care of the local authority (*viz.* a care order),[37]

(iv) a hospital order under the Mental Health Act 1959 (this may be combined with a care order provided it is not an interim order),[38]

(v) a guardianship order under the Mental Health Act 1959.

The general approach marks an apparent contrast with that adopted in the United States since the decision of the Supreme Court in *Re Gault*,[39] particularly as regards the offence condition of section 1 (1) (*f*). In *Re Gault* the Supreme Court held that, if a young person is accused of an offence which may result in his being "deprived of his liberty," he is entitled at the adjudication stage of any proceedings to the following rights:

(i) the right to silence, or privilege against self-incrimination, as guaranteed by the Fifth Amendment to the United States Constitution extended to State courts by the Fourteenth Amendment;

(ii) the right to written notice of the exact charge against him;

(iii) the right to counsel[40]; and

(iv) the right to confront and cross-examine witnesses.[41]

Against the English background, the most contentious parts of this judgment seem to be (a) the assumption that a child or young person has any absolute right to liberty, since a parent or guardian may deprive him of any part of this provided no injury to the child's health or development can be proved; and (b) the right to silence, or freedom from self-incrimination. This is a doubtful right even as regards adults, but to insist that the ten-year-old must be informed that there is no need for him to say anything about the matter under inquiry and that he has an absolute right to remain silent hardly seems conducive to the child's welfare. An excess of paternalism or authority unrestrained by definite rules may, on the other hand, work grave injustice, as the facts of *Gault's* case cogently demonstrated. The latest indications are that, because of the stringency of the *Gault* rules, police and social workers in the United States are increasingly dealing with the young out of court. This is a similar result to that aimed at by the English Act of 1969, but without the safeguards for the young person contained in that Act.

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[36] This is defined in s. 11 and regulated by ss. 12–19. By s. 7 (2) a probation order can no longer be made for those under the age of 17 years.

[37] The care order replaces the previous "fit person order," which is abolished by s. 7 (*b*). By s. 20 (1) it means "committal" to the care of a local authority, whose powers and duties are defined by s. 24. It seems unfortunate that the word "committed," with its quasi-penal connotations, is used both in the 1969 Act and also in the Matrimonial Causes Act 1965, s. 36 and the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (1) (*e*), when reference is made to a court placing a child in the care of a local authority.

[38] With this exception, only one order may be made at any one hearing.

[39] 387 U.S. 1 (1967).

[40] Where legal aid is required, this is not, as in this country, counsel of the defendant's choice. In most "small crimes courts" of the United States it is the judge who allocates counsel to the defendant, and the dubious right to make this allocation is warmly defended by many judges.

[41] Considerable literature has been stimulated by the decision in *Gault's* case. References may be found *inter alia* in the *Family Law Quarterly* of the American Bar Association, Vol. I No. 2 (December 1967); Vol. II No. 2 (June 1968); Vol IV No. 2 (June 1970); *Children* (an interdisciplinary journal issued by the U.S. Department of Health, Education and Welfare: May–June 1968).

In view of a possible finding of guilt in proceedings that do not amount to a criminal trial, section 3 of the 1969 Act contains various special provisions regarding this " offence condition."

Proof is to be to the criminal standard.[42] Proceedings alleging that the condition is satisfied may be instituted only by a local authority or a constable. There are also provisions against double jeopardy and for appeals. If the condition is satisfied in respect of a young person and he consents, the court may order him to enter into a recognisance for up to £25. When this condition is alleged in respect of an indictable offence, the court also has power to order the person before it to pay compensation up to £100 for loss or damage to property, or if he is a child, to order his parent or guardian to do so.

Much was said in the debates and discussion on the 1969 Act to the effect that the provisions of s. 1 (2) of the Act might result in two or more children or young people being found committing an identical offence, and a care order being made in respect of one, whose home was considered inadequate, but not of the other, thus offending the public sense of justice. This argument appears to involve at least two false assumptions: (a) that " care " orders are and should be seen to be a form of punishment for the child or young person, and (b) that such punishment should " fit the crime " rather than be appropriate to the needs of the individual before the court. I consider first the second point, that of treatment. The importance of treatment being appropriate to the particular youngster and not to the events that immediately led to his appearance in court is not lessened because the families of those likely to be affected by this legislation are among the least educated and most punitive-minded members of society.[43] The real difficulty here is that the treatment available for these children, advanced as it may be by world standards, rarely approaches that of normal family life with all its imperfections. It remains to be seen how successful the 1969 Act's attempts to reform such treatment prove to be.

The first objection, however, touches on one of the most difficult questions involved in the new policy. The principal object of permitting only "care" proceedings in respect of all those under the age of fourteen years and bringing as many young people as possible within such proceedings, is to try to stop dealing with deprived, even if socially dangerous, young people as criminals. But one result may be—if it has not already taken place—to nudge those children who have been neglected or ill-treated but show no anti-social tendencies into what largely amounts to a juvenile delinquents' court and sphere of treatment. Under the Administration of Justice Act 1970, Sched. 1, two areas only of appeals concerning children are excluded from the purview of the new Family Division of the High Court, but will continue to be heard at quarter sessions. They are: (a) from orders of the juvenile court under the Children and Young Persons Acts [44] and the Children Acts, and (b) from the grant or refusal of an affiliation order under the Affiliation Proceedings Act 1957. The Royal Commission on Assizes and Quarter Sessions 1966–69 has recommended [45] the setting up of a special juvenile appeals court with a circuit judge as chairman and two justices drawn from juvenile court panels as members, to hear appeals from the juvenile court. It is not clear whether this also includes appeals concerning adoption orders made by that court. The Beeching Commission has also recommended,[46] with admirably clear vision, that since affiliation proceedings are purely civil matters, appeals concerning them should in future be heard by the county court. This will presumably involve pruning the Affiliation Proceedings Act 1957 of its present quasi-criminal approach and vocabulary.[47]

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[42] The wording is complicated, but this appears to be the net effect.

[43] See Dame E. Younghusband: *Social Work and Social Change*, pp. 62–77.

The closer association of the local authority with all proceedings and subsequent treatment is another principle of the 1969 Act. The treatment the child or young person subject to a care order will in future receive will be decided not by the court, but by local authority officers, which will make for greater flexibility of treatment, but may eliminate judicial safeguards. The Act provides,[48] however, that if communication between parents or guardians and the person in care are infrequent for twelve months, the local authority shall appoint an independent visitor for him.[49] A logical development of this trend is that, with rare exceptions,[50] the probation service will no longer be concerned with inquiries concerning or supervision of children and young persons under the Children and Young Persons Acts. This duty will fall mainly on the Children's Officers, but to some extent on other welfare officers employed by the local authority. Under the Local Authority (Social Services) Act 1970, ss. 2–3 and Scheds. 1 and 2, each local authority or group of two or more authorities will have a social services committee and by section 6 the social services department will be under the direction of a director of social services, so that the activities of the various officers are co-ordinated.

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[44] There are specific provisions for appeals to quarter sessions in the 1969 Act, ss. 2 (12) and 3 (7).

[45] Cmnd. 4153, para. 226.

[46] *Ibid.*, para. 228.

[47] By the Legitimacy Act 1959, s. 5, applications for an affiliation order were included among domestic proceedings within the Magistrates' Courts Act 1952, and are heard in private. But applications for variation of orders made are not covered by this provision. Appeals on fact to quarter sessions take the form of a rehearing in open (criminal) court. After the Administration of Justice Act 1970, s. 1 and Sched. 1 come into operation, appeals on law will still go to the Queen's Bench Division of the High Court. Proceedings for a declaration of legitimacy will, however, be heard by the Family Division.

[48] s. 24 (5).

This is another matter which may clearly mark off children who have been the subjects of proceedings under the Children and Young Persons Acts from those who have been placed under supervision or possibly in the care of local authorities as the result of matrimonial disputes between their parents. We now have the anomalous situation that proceedings for maintenance or separation or custody of children come before the magistrates' courts under the Matrimonial Proceedings (Magistrates' Courts) Act 1960,[51] whereas under the Matrimonial Causes Act 1967, s. 1 (3) all matrimonial causes such as divorce or nullity petitions must be commenced in a divorce county court; defended matrimonial causes are then transferred from the county court to the High Court (Family Division, under the Administration of Justice Act 1970). Under the Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (1) (*e*) the magistrates may "commit" to a local authority the care of any child of the family in respect of which they hear a complaint, and under section 2 (1) (*f*) the magistrates may provide that any child of the family should be under the supervision (i) of a probation officer or (ii) of a specified local authority. By section 3 (1) the local authority must be informed and its representations heard before any child is committed to its care. By section 4 (2), the magistrates may call for a report by a probation officer or officer of a local authority on matters relevant to any decision about custody, care or supervision of or access to any child of the family. Probation officers have duties to attempt reconciliation of parties appearing before magistrates on a complaint, and since the probation officers are in constant attendance in magistrates' courts for this and other reasons, it is normally they who are asked to make reports about the circumstances of children of the families involved, and who are entrusted with supervision of children. Similarly, under the Matrimonial Causes Act 1965, s. 36, as amended by the Matrimonial Causes Act 1967, s. 2, the county court or, exceptionally, the High Court has power to commit to the care of a local authority children of families involved in matrimonial disputes, and under section 37 it has power to provide for supervision of any such child by an officer appointed under the section as a welfare officer or a local authority. Here again, the welfare officers constantly in attendance at divorce county courts and at the High Court are primarily concerned with reconciliation between the spouses, and are drawn principally if not exclusively from the probation service. It is normally they who are entrusted with making any inquiries considered relevant or with supervision of a child. Orders " committing " a child to the care of a local authority in either magistrates' court, county court or High Court appear to be extremely rare.

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[49] The person appointed must satisfy conditions to be laid down by the Secretary of State with a view to securing that he is independent of the local authority in question and unconnected with any community home. But such an "independent" person must be appointed by the local authority in whose care the child is.

[50] By s. 9 it is the duty of the local authority or local education authority to make such investigations regarding home surroundings, school record, health and character of the person in respect of whom the proceedings are brought as will assist the court. By s. 13 (2) a court is not to place a child under the supervision of a probation officer except on the request of the local authority and when the probation officer is already occupied with another member of the child's household.

[51] See (1961) 24 M.L.R. 144.

These anomalies emphasise also the importance of a completely different approach to the problems of parent and child from that adopted in disputes between parents. It would be much better if all the provisions regarding children were taken out of the Matrimonial Causes Acts and Matrimonial Proceedings Acts and enshrined in a separate statute concerned only with parents and children, thus bringing home to the court the fact that in considering these questions they are no longer concerned with disputes between spouses.

The 1969 Act has also made new provisions for children received or " committed " to the care of local authorities and those found guilty of offences. Where children are placed in small foster-homes, either directly by their parents or by local authorities, it is clear that the foster-parent must be prepared to surrender the child at any time on demand either by the parent or the local authority. It is surprising that even some normal families are prepared to receive a child into their midst on such conditions. The decision of the House of Lords in *J.* v. *C.*[52] may prove of crucial importance for the development of the law of children, since it is the first decision authoritatively to deny the absolute right of the natural parents to demand the return of their child after however long an interval, however little attention they may have paid to him and whatever the conditions to which they demand his return. More usually, however, the small " family groups " receiving foster-children are one-parent families. Male members leading a normal male life are thin on the ground. Larger institutions for the care of children also tend to be staffed mainly by one sex only, and there have been unhappy recent reminders that the dangers of rigidity and authoritarianism are real. Part II of the 1969 Act, in sections 51–59, strengthens the provisions for visits by local authority officers to foster-children and protected children under the Children Act 1958, Part I, and the Adoption Act 1958, Part IV. Sections 35–50 of the 1969 Act provide for the reorganisation of the institutions provided for delinquent youngsters who are not boarded out with foster-parents, so as to enable local authorities to develop a comprehensive system of community homes to cover the needs at present met by local authority children's homes and hostels, remand homes, reception and remand centres, local authority and voluntary approved schools and some voluntary children's homes. Approved schools as such are abolished,[53] but their buildings will be brought into the general plan of community homes to be provided, as will other specialised institutions, in an endeavour to create a more flexible system.

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[52] [1970] A.C. 668. The Houghton Committee has made recommendations on this difficult question in paras. 170–178 of its working paper published in October. See also *Krishnan* v. *Sutton L.B.C.* [1970] Ch. 181 (C.A.); *Re T. (A. J. J.) (An Infant)* [1970] 3 W.L.R. 315 (C.A.).

Two forms of treatment intermediate between supervision in the child's own home and long-term stay in a specialised institution are also envisaged, *viz.* (a) residence in or attendance at a specialised institution or participation in a work project for up to one month in each year of supervision and (b) short-term residence for up to three months in a specialised institution.

A children's regional planning committee has been established in each of twelve planning areas designated by the Home Secretary.[54] Its function will be to draw up a regional plan for the provision of community homes, including observation and assessment facilities, to be provided either by the local authorities or by voluntary organisations, but in the management of which the local authority will take part.[55] These latter will be known as controlled community homes when the local authority appoints two-thirds of the managers, and assisted community homes when it appoints one-third of them. An instrument of management for such homes will be issued by the Home Secretary.[56] All community homes will be subject to Home Office regulations.[57]

This amounts to a fresh approach, but to existing staff in long-established—and frequently old—buildings. The extent to which it will be successful will largely depend not only on adequate finance, but on the drive and inspiration of large numbers of people, and the realisation that this area of social welfare is one central to the whole concept of family law, and a rewarding field for a far greater supply of legal, as well as educational and administrative, talent than it has so far received.

O. M. Stone.*

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[53] 1969 Act, s. 7 (5).

[54] *Ibid.*, s. 35. By S.I. No. 335 of 1970 12 planning areas were designated and area planning committees were established by June 30, 1970.

[55] *Ibid.*, s. 36.

[56] *Ibid.*, ss. 39–40.

[57] *Ibid.*, s. 43.

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THE MAINTENANCE QUAGMIRE

THE first part of this paper deals with some of the problems affecting support rights and obligations between members of the family group; in the second part the interest of the community in enforcing and underwriting these obligations is briefly considered. Throughout, the law is seen to be confused and inconsistent; it is marked, above all, by a failure to take systematic decisions on the social policies which it seeks to uphold.

A. SUPPORT OBLIGATIONS WITHIN THE FAMILY

I. *Husband and Wife*

1. *Reform*

The Matrimonial Proceedings and Property Act 1970 [1] introduces a number of reforms, mostly rationalisations and simplifications of the existing law. There is much re-drafting and minor modification (*e.g.* of the court's powers to set aside dispositions intended to defeat claims to maintenance,[2] and of the provisions dealing with the variation of maintenance agreements [3]) but the major and welcome reform is to introduce a unified code of ancillary relief.[4] In addition to maintenance pending suit, the court can in all [5] proceedings order "financial provision" (in effect, maintenance—a term which was rejected as suggesting some inferiority on the part of the recipient),[6] which may be secured. In proceedings for nullity, judicial separation or divorce, the court may order a lump sum to be paid, a transfer of property, a settlement for the benefit of the spouse and the children of the family, and a variation of any ante-nuptial or post-nuptial settlement (including a settlement made by will or codicil). All orders for secured provision can be made for the lifetime of the payee (although unsecured provision will still terminate on the payer's death: the spouse will then be left to take proceedings for provision out of the deceased's estate [7]). The Act abolishes the action for restitution of conjugal rights [8] (now otiose in view of the unlimited powers to order secured provision and to order a wife to settle property of any kind) and the wife's agency of necessity.

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[1] Largely implementing the recommendations of Law Com. No. 25: Report on Financial Provision in Matrimonial Proceedings; see also the Law Commission's Published Working Paper No. 9 (1967) which deals with some aspects of the problem in more detail than the report. For *Parliamentary Debates* see H.L.Deb., Vol. 305, cols. 471, 494, 854; Vol. 306, col. 263; H.C.Deb., Vol. 794, col. 1658; Standing Committee J, April 29, 1970, May 6 and 13, 1970; Vol. 801, col. 1943. Debate on the Bills in the House of Commons was much shortened by the imminence of the dissolution: 7½ hours were spent in Standing Committee discussing the first five clauses; after the announcement of the dissolution the committee and other stages of the Bill were completed in less than 2¼ hours. As a result many important amendments were not debated.

This paper is solely concerned with *maintenance*; for the effects of the Act on matrimonial property, see O. Kahn-Freund, p. 601 (*supra*).

[2] s. 16.

[3] ss. 13–15.

[4] ss. 1–5, 7–8.

[5] *i.e.* including proceedings for wilful neglect to maintain, under s. 6.

[6] See Law Com. 25, p. 4, note 12.

Two major changes of principle are made by the Act:

(i) *The move to greater equality between husband and wife.* The right to apply for financial relief is now conferred equally on husband and wife. The only exception to the logical symmetry is that if the application is solely on the grounds of neglect to maintain a husband applicant, he must establish that his earning capacity has been impaired through age, illness or disability of mind or body, so that it is reasonable to expect his wife to maintain him. This is because [9] the pattern of the provision in the existing Matrimonial Proceedings (Magistrates' Courts) Act 1960 has been adopted, rather than recasting that section, which would have involved a complete reformulation of mutual support obligations.

(ii) *Maintenance ceases on remarriage.* In the early days of the Divorce Court, orders in favour of a wife were normally made *dum sola et casta.* This practice fell into desuetude,[10] no doubt partly because the court's power to vary maintenance awards would be used to terminate a maintenance order if remarriage gave the wife adequate support. The Law Commission's tentative proposal [11] that all periodical maintenance payments should cease on remarriage received "almost unanimous support, which includes that of the various women's organisations that favoured us with their comments," and the Act so provides. It thus adopts the philosophy that a woman should only be entitled to the standard of living enjoyed by her in marriage so long as she does not acquire another matrimonial source of support. This principle could place a divorced woman in a position where she would lose substantially by contracting a marriage (as distinct from an illicit union) with a man who was poorer than her first husband. The new principle may be acceptable in the case of a childless marriage, but it could cause severe strain if the mother has custody of a child who is still to be maintained in a manner suitable to the financial position of the first marriage.[12] Even if powers are infrequently used it is desirable to have them available for use on the occasions when they are needed. In addition to this objection, the new principle seems inconsistent with the Law Commission's exhortation [13] to the courts to make extended use of the power to order lump sum payments. It is said that such an award (in addition to its advantages to the wealthy [14]) avoids difficulties of enforcement (it is proveable in bankruptcy proceedings [15]) that it will often be the only effective way in which a woman can be compensated for lost pension rights, and that " it enables the parties to start afresh without relics of the past hanging like millstones round their necks." [16] But many divorces take place when the parties are comparatively young, and there is a high percentage of second marriage amongst divorcees.[17] Since it is normally impossible to vary a lump sum award,[18] it would seem that the court will be obliged to take into account the likelihood of the woman remarrying [19] (thus determining her periodical maintenance, but not her lump sum award). It is true that the courts could combine the security advantage of a lump sum award with justice to the husband by ordering (instead of an outright payment) a settlement in trust [20] for the wife for life or until remarriage, possibly with power to pay over portions of the capital as the years go by, but the wife would not then be able to make use of the capital to set herself up in business, and one of the principal advantages of lump sum awards in the case of families of comparatively modest means [21] is thus negatived.

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[7] Inheritance (Family Provision) Act 1938 as amended if the marriage still subsisted at death; Matrimonial Causes Act 1965, s. 26 if it had been terminated.

[8] s. 20, implementing Law Com. No. 23, Report on Restitution of Conjugal Rights.

[9] Law Com. 25, para. 19.

[10] *Cf. Fisher* v. *Fisher* (1861) 2 Sw. & Tr. 410; *Lister* v. *Lister* (1889) 15 P.D. 4.

[11] See Working Paper No. 9, paras. 40, 69: Law Com. 25, para. 14.

[12] See *e.g. O'Regan (formerly Driscoll)* v. *Driscoll* (1969) 13 F.L.R. 417.

2. *The problem of principle*

Section 5 of the Act directs the court, in deciding what orders to make in divorce, nullity or judicial separation cases

> " to have regard to all the circumstances of the case including the following matters, that is to say—
>
> (*a*) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (*b*) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (*c*) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (*d*) the age of each party to the marriage and the duration of the marriage;

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[13] Law Com. 25, para. 9.

[14] *Cf. Davis* v. *Davis* [1967] P. 185; *Schlesinger* v. *Schlesinger* [1960] P. 191.

[15] *Curtis* v. *Curtis* [1969] 1 W.L.R. 487.

[16] Law Com. 25, para. 9.

[17] See generally Rowntree: Some Aspects of Marriage Breakdown in Britain . . . *Population Studies*, Vol. 18, 147.

[18] s. 9 (2) (*d*), (4).

[19] As in assessing damages under the Fatal Accidents Acts 1846 to 1959: see *Goodburn* v. *Thomas Cotton* [1968] 1 Q.B. 845.

[20] s. 4 (*b*).

[21] *von Mehren* v. *von Mehren* [1970] 1 W.L.R. 56.

(*e*) any physical or mental disability of either of the parties to the marriage;

(*f*) the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(*g*) in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other." [22]

For the first time, therefore, specific guidelines are laid down by statute, but in reality the only novelty is the direction to have regard to contributions to the welfare of the family, and to consider lost pension rights. It remains to be seen how these will be applied in practice: if capital is available to be divided it may be possible to compensate a wife for her past services and lost expectations; if not, it is difficult to see where the money for these purposes will be found, given that most men cannot support two families, even on the present basis.

The basic principle which the Act adopts is one whose implications [23] have not been subjected to reappraisal in the light of changed conditions. This is that by virtue of the fact of marriage, a wife is henceforth entitled to be maintained on a scale appropriate to the husband's status in life,[24] unless she has by misconduct forfeited that right. This approach is strikingly illustrated by *Brett* v. *Brett* [25]: a woman of twenty-three (who had qualified as a solicitor, and was thus presumably capable of earning her own living, but had no capital assets) divorced her wealthy husband after a marriage which effectively lasted only five and a half months, on the grounds of cruelty. There were no children. She obtained an order for annual maintenance of £2,250 together with a lump sum of £25,000. It is submitted that the principle applied in this case is objectionable and outmoded: like so much of English family law it originates in the economic and social conditions of Victorian England. There will doubtless be many cases in which it will (given the division of labour under which a wife stays at home so enabling her husband to build up a lucrative career) be just to ensure that the standard of living which the wife had come to expect in marriage should not suffer by the termination of the union.[26] Such awards could be justified on the basis of the length of the marriage, the age of the parties, and their contribution to the marriage. If it is merely sought to do justice in such cases it is not necessary to accept the basic premiss now enshrined in the Act. There are two main objections. Firstly, it may well be psychologically harmful to the woman concerned: as an American judge has put it[27]

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[22] s. 5 (1). These guidelines do not apply to proceedings on the grounds of wilful neglect to maintain, where (since there has been no recasting of the obligations) the old law remains in force. See Law Com. 25, para. 21, and generally, Brown, "The Offence of Wilful Neglect to Maintain" (1960) 23 M.L.R. 1.

[23] The rationale of support obligations has been the subject of far more academic discussion in the United States, than in England. Important articles are: Paulsen, "Support Rights and Duties between Husband and Wife" (1956) 9 Van.L.Rev. 709; Hofstadter and Levi, "Alimony: A reformulation" (1967) 7 *Journal of Family Law* 51. See also Ontario Law Reform Commission, *Family Law Project* (Toronto 1969), Vol. XII.

[24] *N.* v. *N.* (1928) 44 T.L.R. 324, 328; *Sansom* v. *Sansom* [1966] P. 52; *Kershaw* v. *Kershaw* [1966] P. 13; *Ashley* v. *Ashley* [1968] P. 582.

[25] [1969] 1 W.L.R. 487.

> "Alimony was originally devised by society to protect those without power of ownership and earning resources. It was never intended to assure a perpetual state of secured indolence. It should not be suffered to convert a host of physically and mentally competent women into an army of alimony drones."

This objection is re-inforced because periodical payments now terminate on remarriage. There must inevitably be a temptation (conscious or subconscious) to dwell on the old relationship when this guarantees a substantial income (which remarriage might well not replace). Secondly, this principle is based on an out-dated concept of marriage and the role of women in society: it is no longer true that a respectable woman can have no gainful occupation and must depend on support from her husband or father.

Even more seriously, the Act (as a corollary) perpetuates the concept of the innocent and the guilty at the very time when it has been eliminated from the divorce law. It may be a tenable point of view that (in the words of the President of the Probate, Divorce and Admiralty Division) "the right and duty of maintenance are related to the performance of the reciprocal matrimonial obligations," and that "it would be unjust to require a husband who had performed substantially all his matrimonial obligations to continue to provide maintenance for a wife who had substantially repudiated hers."[28] Nevertheless, the Divorce Reform Act (passed after prolonged discussion[29] of the issues) adopts the principle that in *most* divorce cases, *both* parties are at fault to some extent, which is inconsistent with the view that one party "substantially performs" while the other "substantially repudiates" his matrimonial obligations. It may be said that the courts, in assessing maintenance, will no longer make the crude antithesis of wholly guilty and wholly innocent, but will "investigate thoroughly the conduct of the parties,"[30] and thus arrive at a true apportionment of responsibility for the marital breakdown. Even if this were possible it would involve precisely that detailed inquisition into the reasons for the breakdown of a marriage which the Law Commission rightly rejected[31] as a basis for a new code of divorce law. If such an inquest is made, the object of enabling the "empty legal shell" of a broken-down marriage to be destroyed with "the minimum bitterness, distress and humiliation"[32] will be frustrated. The reason why divorce cases were so often defended in the days of the matrimonial offence principle was precisely because of the repercussions on maintenance (or custody), which were "often those which are at the very heart of the real issues with which the parties are concerned,"[33] even although the *form* of a divorce decree was not conclusive on questions of maintenance.[34]

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[26] For an eloquent statement of this position, see Sir J. Simon: "The Seven Pillars of Divorce Reform" (1965) 62 Law Soc. Gaz. 344.

[27] *Per* Hofstadter J., *Doyle* v. *Doyle*, 15 N.Y.S. 2d 909 (1957).

[28] *Op. cit.*, at p. 348.

[29] The Law Commission, *The Field of Choice* (Cmnd. 3123, 1966), para. 25, *Putting Asunder* (S.P.C.K. 1966), paras. 89 *et seq.*

However small the relevance of the commission of a matrimonial offence to responsibility for marital breakdown, at least the issues were justiciable: the point to be decided, was narrow and defined, particularly in the case of adultery.[35] In contrast, a wide ranging assessment of the whole of the parties' conduct is not one that the courts are in any way fitted to carry out. Maintenance proceedings take place before a registrar largely on the basis of written pleadings. Every item of conjugal unkindness[36] which can be recalled will have to be dragged out of the past, embodied in an affidavit, and the parties then subjected to cross-examination on the allegations. All matters relevant to the assessment of responsibility will be fought over, since there is no longer any rule of public policy to prevent matters which could have been raised in the trial of the action being brought forward in maintenance cases.[37] The virtual abolition of the absolute and discretionary bars to divorce entails that a decree granted to one party (even on the basis of one of the offence "facts") no longer indicates that the other party has not himself been guilty of even more culpable behaviour. It is very difficult to accept the Law Commission's view[38] that

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[30] See Lord Hanworth, *Restall* v. *Restall* [1930] P. 189, 195. It is sometimes argued that because conduct is the last factor to be mentioned in the section it is the least important. This is unconvincing. The wording is quite clear; "conduct" may appear last in position, but it is not so syntactically and governs the whole section.

[31] *Field of Choice*, paras. 58 *et seq*.

[32] *Ibid*. para. 15.

[33] *Per* Sachs L.J. *Porter* v. *Porter* [1969] 3 All E.R. 640, 644; Simon, *op. cit*., at p. 343.

[34] *Sydenham* v. *Sydenham and Illingworth* [1949] 2 All E.R. 196; *Trestain* v. *Trestain* [1950] P. 198.

[35] Hence solicitors' traditional preference for "a nice straight adultery"; see D. Marsden, *Mothers Alone* (1969), p. 166. The whole of this book (but particularly Chap. 9, "Legal Action involving the Father") gives a valuable insight into the actual working of the law relating to support obligations.

[36] *Courtney* v. *Courtney* [1968] P. 523.

[37] *Tumath* v. *Tumath* [1970] P. 78.

[38] *Field of Choice*, para. 27.

> "If the question of fault could be regarded as relevant only at the stage when maintenance comes to be determined in chambers and not in public, much of the distress could be avoided. . . . The Court would be likely to obtain a more realistic assessment of the relative fault. . . If it were possible to dispense with formal declarations of guilt or innocence at any stage, some of the bitterness might be drained out of divorce litigation and maintenance might be assessed on a truer assessment of relative blame than under the present system."

The assumption that litigants distinguish between a chambers hearing and one in open court is dubious; it is known that many women find the procedure in magistrates' courts repellent[39] in spite of the fact that the public is excluded. It also ignores the fact that a spouse whose maintenance is reduced because of her alleged wrongdoing will be reminded as each payment is made of what may well appear to be a major injustice, particularly since the procedure is bound to favour those who have a facility for cataloguing distant matrimonial misconduct. She will not even necessarily have the consolation of knowing the registrar's reasons for "limiting or inhibiting . . . [his] generosity."[40] The system of awarding maintenance as a prize for good behaviour ignores the fact that many, at least of the more articulate spokesmen for women's rights, bitterly resent[41] a system under which they have no fixed and ascertainable rights or expectations if their marriage breaks down, but are instead left to the (as it may seem) capricious exercise of the (usually male) judicial discretion. As one of the foremost fighters for women's rights put it, nearly a century ago: "with all their kindly feelings, their good intentions, their readiness to labour and sacrifice themselves for women, men give us most rarely that which we really want: not favour, but—Justice."[42] This complaint will be reinforced if a man (possibly divorcing a wife who is innocent of any matrimonial offence, against her will) is then to temper the "generosity" of the registrar by enumerating her alleged matrimonial failings.

Even if it is thought that this is the principle which the courts should apply, it is likely that there will be wide variations in the way in which it is applied. It is disturbingly difficult to get information about the way in which the courts in fact exercise the considerable discretion vested in them under the existing law. Some of the textbooks[43] suggest that permanent maintenance (although in the court's discretion) is generally given on the old basis of the Ecclesiastical Court that the wife should have one-fifth of the joint income in alimony pending suit, and one-third of the joint income in permanent maintenance and this approach is referred to with approval in some of the few cases which are reported. Yet in other cases these principles are described as " discredited." [44] It has been said [45] that the court has been given an unfettered discretion, and it would be contrary to the intention of the statute to formulate any rule for its exercise. The case for having a wide discretion is formidable, but only if there is some common understanding of the principles to be applied. This is particularly important now that divorce suits are usually heard in county courts, argued by local solicitors or inexperienced counsel. It is difficult to know on what basis advice should be given, and local conventions will inevitably grow up. Two cases dealing with the effect of misconduct on a wife's maintenance suggest that this may already have happened: in *Porter* v. *Porter* [46] a county court judge was said by the Court of Appeal to have expressed views which were " decades if not generations out of date "; in *Iverson* v. *Iverson* [47] it became clear that the matrimonial tribunals in another part of the country were still applying a supposed rule that a wife who was guilty of adultery was in no circumstances entitled to maintenance many years after this had ceased to be accepted practice elsewhere. No doubt in these courts the same (erroneous) rules had been applied in cases before appeals were made in cases which happened to involve a clear point of principle. It is true that the courts have in recent years stressed that, in exercising discretion " the human outlook of the period in which they make their decisions " must be taken into account, and that " . . . in the exercise of any such discretion the law is a living being moving with the times and not a creature of dead or moribund ways of thought." [48] Unfortunately, in the absence of any adequate public discussion, different judges will have different views as to the appropriate human outlook: it is, after all, only fourteen years since a substantial minority (which included two Law Lords) of the Morton Commission [49] thought it " wrong in principle " that a wife who had committed a matrimonial offence should ever have the right to be maintained by the husband.

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[39] Marsden, *op. cit.*, p. 150 *et passim*. There is some controversy as to the role of officers of the Supplementary Benefits Commission exercising pressure on unwilling women to take legal proceedings: *ibid.* and P. Morris: *Prisoners and their Families* (1965), p. 242.

[40] *Wright* v. *Wright* [1970] 1 W.L.R. 1219, 1228.

[41] See *e.g.* the debates on the Matrimonial Property Bill (January 24, 1969), H.C. Deb., Vol. 776, col. 801.

[42] F. P. Cobbe: *Duties of Women* (1881).

[43] *Cf.* Tolstoy, 6th ed., pp. 136, 138, 144; Rayden, pp. 526, 832; *Gilbey* v. *Gilbey* [1927] P. 197; *Sansom* v. *Sansom* [1966] P. 52; *Williams* v. *Williams* [1964] 3 All E.R. 526, and see *B. (G. C.)* v. *B. (M. A.)* [1970] 1 All E.R. 913 for a recent application of this division.

8. *Other courts, other laws*

(a) *Bars in magistrates' courts.* Paradoxically although an adulterous wife who is divorced may still get maintenance from her husband, in magistrates' courts there are rigid statutory bars, which may prevent any relief being given to a needy woman, notwithstanding the merits of her case, solely on the grounds of her commission of a matrimonial offence. This is unfortunate: first, because it may well be grossly unjust; secondly, because the continuance of the matrimonial offence may inhibit the development of magistrates' courts as speedy local tribunals for dealing with routine maintenance claims. The bars are:

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[44] *Kershaw* v. *Kershaw* [1966] P. 18.

[45] *Per* Scarman J. *Kirke* v. *Kirke* [1961] 1 W.L.R. 1411.

[46] [1969] 1 W.L.R. 1155.

[47] [1967] P. 184.

[48] *Porter* v. *Porter* (*supra*).

[49] Royal Commission on Marriage and Divorce, Cmd. 9678, paras. 501–508; the majority who favoured allowing the courts some discretion thought it would only rarely be exercised.

(i) If the cause of complaint is the defendant's adultery, no order can be made unless the court is satisfied that the complainant has not condoned, connived at or conduced to the adultery.[50]

(ii) If the complainant has, at any time during the subsistence of the marriage, committed an act of adultery, no order can be made unless the court is satisfied that the defendant has condoned, connived at, or conduced to the adultery.[51]

(iii) If an order has been made, then it must be discharged if it is shown that the complainant has during the subsistence of the marriage committed an act of adultery, unless that act has been condoned, connived at or conduced to.[52]

Similarly, if the wife is found to be in desertion, her right to be maintained is suspended.[53]

It is sometimes argued [54] that if "guilt" were abolished as the test in maintenance proceedings the issues would not be clear enough for a lay tribunal to assess. Even if this justified the retention of the matrimonial offence as the *cause of action* in magistrates' courts, it would not follow that there should be rigid bars if the wife herself committed an offence. The court could be given a discretion.

It is submitted, however, that the argument is fundamentally unsound. First, it assumes that laymen (even guided by their clerk) are more likely to comprehend the refinements of the law of desertion or condonation than the simple test of need (even if in determining this they are given a discretion to take culpability into account).

Secondly, it assumes that the technicalities of matrimonial offences such as desertion [55] necessarily give a reliable indication of guilt. This is not so. For example, because of the housing shortage, an offer of accommodation elsewhere may tempt a wife to leave, even although technically without just cause, thus putting herself in desertion. Again, much may depend on the form of words which is used: had the deserting spouses in *Tickle* v. *Tickle*[56] and *Lilley* v. *Lilley*[57] been educated in the law they could certainly have phrased their refusals to cohabit in such a way that they would, whilst conveying exactly the same message, not have put themselves in desertion.

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[50] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 2 (3) (a).

[51] *Ibid.*, s. 2 (3) (b).

[52] *Ibid.*, s. 8 (2).

[53] *Naylor* v. *Naylor* [1962] P. 253; *Treharne* v. *Treharne* (1966) 111 S.J. 34.

[54] Working Paper No. 9, para. 9; Rosen, *Matrimonial Offences* (2nd ed. 1965), p. 2; *cf.* Milner, "The Place of 'Fault' in Economic Litigation between Husband and Wife" (1959) 109 L.J. 215.

[55] See *e.g.* *Nutley* v. *Nutley* [1970] 1 W.L.R. 217; *Fraser* v. *Fraser* [1969] 1 W.L.R. 1787.

Thirdly, the bar of adultery operates unfairly: a woman who has "substantially fulfilled all her matrimonial obligations" and yet been deserted by a cruel husband loses all right to maintenance from him if she commits a single act of adultery. Unfortunately for her, the husband may easily get proof of this since women (unlike men) become pregnant.

(b) *The basis of a local family courts system.* There is some evidence that magistrates' courts proceedings are now often used by women simply as "a staging post on their way to the High Court as petitioners"[58] for divorce. The order which she obtains from the magistrates continues after divorce, and this supposedly summary procedure thus becomes a way of providing permanent maintenance.

The practice of applying for a financial order to a magistrates' court and thus leaving the High Court or county court only to determine the status of the marriage has much to recommend it:

(i) Attempts at reconciliation are far more easily made at this stage and in the comparatively informal atmosphere of a magistrates' court. Substantial use is made in magistrates' courts of the probation service in an attempt to bring about a reconciliation:

MATRIMONIAL CONCILIATION WORK OF THE PROBATION SERVICE, 1968[59]

	Referred by the courts Before issue of summons	After issue of summons	Referred by clerk to justices	Applied direct to probation officer
One party seen	939	638	476	11,725
Both parties seen	883	2,745	574	8,782
Total	1,822	3,383	1,050	20,507

This overall total of 26,762 cases contrasts sharply with the total of 66 cases referred to probation officers as welfare officers by Divorce Court judges. That figure has risen somewhat over the years (from only 27 in 1965) whereas the figure of other matrimonial conciliation done by probation officers has fallen.[60]

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[56] [1968] 1 W.L.R. 937.

[57] [1960] P. 158.

[58] Committee on Statutory Maintenance Limits (Graham Hall), Cmnd. 3587, 1968, para. 35.

[59] Source: Report on Work of the Probation and After Care Department 1966–68 (Cmnd. 4233, 1969), Appendix F.

[60] *Ibid.*, para. 109.

(ii) The procedure is quick and may be informal. It is true that delay sometimes occurs in serving the summons on the husband, but once it has been served the case will come on quickly and without the necessity for lengthy pleadings. In the High Court procedure, on the other hand,

> " the fact of the matter is that time goes by in . . . a way which is appallingly difficult for clients to bear. It cannot be helped; people have to get instructions, draft affidavits, swear affidavits, answer affidavits and so on and so on. . . ." [61]

In the end, an order for alimony pending suit will possibly be backdated, but a wife " can't live on backdated orders. . . ." [62] Even if the husband files a petition for divorce before the complaint is heard (a device which, in the past, was much used to stop the magistrates hearing a case), it is now possible for the magistrates' court to make an interim order for maintenance if the husband objects to their adjudicating on the complaint.[63]

It is true that, apart from the substantive law, there are procedural defects in the present magistrates' courts' system [64]:

(i) The use of the police in serving process, and in the courtroom, no doubt gives a criminal air to the proceedings.

(ii) A more substantial objection is that the courts often work on inadequate factual information. Although there is power [65] to ask a probation officer to investigate the parties' means, and report to the court, this is infrequently done, partly because the Divisional Court has held that its use should be limited to cases where the justices are satisfied that it is the only reasonable way in which the truth can be ascertained.[66] Unfortunately, this means that orders are often made on the basis solely of looking at the husband's last pay slip (which may, for instance, make no mention of overtime earnings [67]). In dealing with wage and salary earners (the vast majority of those who come before the courts) it is necessary to find some middle way between the elaborate procedure of written affidavit, answer and discovery in the High Court and the apparent lack of investigation in magistrates' courts. It would seem probable that an inquisitorial approach by an experienced court officer or representative of the Supplementary Benefits Commission could, in most cases, ascertain the truth rather more efficiently than either of the existing procedures.

(iii) A further objection made to the magistrates' court procedure has been that the proceedings might be reported; the classification of "domestic proceedings"[68] means that the public are excluded, but not that press reports cannot appear. Since High Court and county court chambers proceedings are completely private, there seems no reason why the same should not be true of matrimonial proceedings in magistrates' courts.

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[61] *Per* Ormrod J. in *Lanitis* v. *Lanitis* [1970] 1 All E.R. 466, 472.

[62] Cmnd. 4288, para. 109.

[63] Matrimonial Proceedings (Magistrates' Courts) Act 1960, s. 6; *Lanitis* v. *Lanitis* (*supra*). The order will, however, terminate after three months: s. 6 (3).

[64] See generally Report by Justice on *Matrimonial Cases in Magistrates' Courts* (1963).

[65] Magistrates' Courts Act 1952, s. 60.

[66] *Kershaw* v. *Kershaw* [1966] P. 13, 18; Rayden, p. 1010.

[67] *Elleman* v. *Elleman* (1964) 108 S.J. 920.

Magistrates' courts have the great advantage that the courts are near at hand for the parties and that informed advice and help is often obtainable from court officials. The system therefore provides the basis upon which a structure of domestic courts could be built. The only financial jurisdiction which is now denied magistrates' courts is the power to make secured provision, and to order lump sum payments. The former is perhaps not suitable for a lay court to deal with, but there seems no reason why laymen should not be permitted to make limited lump sum awards—particularly to discharge debts.[69] At the same time, the local court could be given power to determine minor property disputes: many small cases involve bitter arguments about the ownership of the furniture in the matrimonial home. Local courts could well deal with these although the substantive law needs to be changed so as to give power to make fair orders relating to property subject to hire-purchase agreements.[69a]

Even if the system is not expanded, it is surely absurd that a woman should be driven to the divorce court because she is debarred from maintenance unless she takes divorce proceedings. No information is available on the extent to which the bars are applied in the courts, but their existence may be one explanation of the disparity between orders applied for and obtained. This is particularly striking when the availability of legal aid is recalled, and is in sharp contrast to the situation in the High Court. The figures for recent years are[70]:

	Magistrates' courts	
Year	Orders applied for	Orders made
1965	27,262	16,442
1966	27,586	17,353
1967	29,508	19,704
1968	30,509	19,911

The proportion of matrimonial suits which is tried in magistrates' courts has fallen sharply (from 93 per cent. of all cases at the beginning of the century to some 37 per cent. today), but the procedure still meets an obvious need, all the more striking now that financial stringency does not keep the poor out of the Divorce Court: in 1968 there were 54,036 divorce petitions, but still 30,509 applications to the magistrates' courts. It seems unfortunate to hinder the satisfaction of this need by rigid archaic bars.

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[68] Magistrates' Courts Act 1952, ss. 56 *et seq.*

[69] *Cf.* Graham Hall Report (*supra*), para. 226.

[69a] This will no doubt have to be considered in the light of the recommendations of the Crowther Committee on Consumer Credit.

[70] Source: Civil Judicial Statistics, 1968, Table 11.

4. *Conclusions*

(i) Once a marriage has broken down, the law places too much emphasis on putting a wife in the same position as she would have been in had it been successful, and regardless of the length of the marriage, her age, and future prospects. It is submitted that the basis for support obligations should be that the existence of a marriage by itself only gives a wife a right to a modest but adequate[71] support until she can again become self-supporting,[72] coupled with a division of any property acquired as family assets. If the marriage has continued for so long that it has, in fact, been the wife's career (and *a fortiori* if there are children of whom she has custody) there is a stronger case for applying the existing rule.

(ii) The court is ill-fitted to assess responsibility for the breakdown of a marriage, and should not generally be asked to do so. Maintenance should depend neither on the crudity of the matrimonial offence, nor the refinement of an assessment of matrimonial behaviour. It should only be in a case of real and substantial injustice (when, for instance, the wife has never really been such, or is being supported by another man) that her conduct should disentitle her to maintenance at the level and for the period suggested above.

(iii) Although, in the past, suggestions[73] that a wife should during the subsistence of the marriage, have a right to a proportion of her husband's income, and to knowledge of his financial situation, have been rejected,[74] it is suggested that these questions need re-examination. Marriage is a partnership; no commercial partnership would exist if the partners did not have the *right* to see the books, even if it is a right which they choose not to exercise. It is over 100 years since John Stuart Mill wrote that "no one would enter into partnership on terms which would subject him to the responsibilities of a principal, with only the powers and privileges of a clerk or agent." Yet women are still required to enter into marriage on terms which would be regarded as backward—in these days of participation—by any self-respecting clerk (or executive, as he would no doubt now be called). Rules of this type might have an effect on social practices and would not be the subject of litigation unless there were acute discontent in which case, even under the existing system, an aggrieved wife may claim that her husband has wilfully neglected to maintain her. As Sir Jocelyn Simon has pointed out,[75] "disputes on the adequacy of the housekeeping allowance are a frequent source of breakdown of marriage." If the law could provide some guidelines, the disputes might be fewer.

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[71] See the full explanation of this concept in Wynn: Family Policy (1970).

[72] Note that a widow receives higher social security payments for a period of six months, to give her some opportunity to adjust to the withdrawal of support.

[73] *e.g.* Women's Disabilities Bill, 1952: H.C. Deb., Vol. 499, col. 899.

[74] See Report of Royal Commission on Marriage and Divorce (Cmd. 9678, 1956), para. 654, Law Com. Working Paper, Appendix B, paras. 21 *et seq.*

(iv) There seems little to be said for having two inconsistent systems of law applied in different courts. There is a case for extending the role of magistrates' courts so that they would be the courts primarily concerned with financial support by one spouse to another. If this is thought undesirable or impracticable, then the advantages of the present procedure could be retained in county court registrar's courts, to which the magistrates' jurisdiction could be extended. It is, however, a first priority to stop the proliferation of courts dealing with the same problems in different ways.

II. *Parent and Child*

The Matrimonial Proceedings and Property Act makes two major changes in the financial rights of children. First, the reliance on blood ties[76] as a pre-requisite for a maintenance obligation has finally been abolished: support obligations now depend on treatment as one of the family,[77] and are not limited to cases of biological relationships to either party. However, in deciding to what extent a spouse who is not the child's natural or adoptive parent should be ordered to contribute to his maintenance, the court must have regard[78]:

> "(*a*) to whether that party had assumed any responsibility for the child's maintenance and, if so, to the extent to which, and the basis upon which, that party assumed such responsibility and to the length of time for which that party discharged such responsibility,
>
> (*b*) to whether in assuming and discharging such responsibility that party did so knowing that the child was not his or her own,
>
> (*c*) to the liability of any other person to maintain the child."

Thus, although the scholastic refinements put upon the expression "*accepted* as one of the family"[79] in the old law have been abolished, so that a liability may be imposed to maintain a spurious child, who had been foisted on the father as his own, the court may *adjust* the liability taking that factor into account, along with the others enumerated above. Presumably the length of time for which the factual relationship of parent and child has subsisted will be highly relevant. Again, a man may accept only a finite financial responsibility for a child; in that case it would be unfair to fix him with a greater liability. The Act also lays down guidelines for the assessment of a child's maintenance: regard is to be had to all the circumstances of the case including [30]:

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[75] *With all my Worldly Goods* (1964), p. 23. For a striking case of abuse of the husband's right to fix the standard of living, see *McGuire* v. *McGuire*, 59 N.W. 2d 336 (1953).

[76] Eroded by the Matrimonial Proceedings (Children) Act 1958, which gave power to make orders for children of one spouse; *cf.* recommendations of the Royal Commission (*supra*), para. 393.

[77] Matrimonial Proceedings and Property Act 1970, s. 27 (1).

[78] *Ibid.*, s. 5 (3).

[79] *R.* v. *R.* [1968] P. 414; *Dixon* v. *Dixon* [1968] 1 W.L.R. 167; *B.* v. *B. and F.* [1969] P. 37; *cf. Kirkwood* v. *Kirkwood* [1970] 2 All E.R. 161.

(a) the financial needs of the child;
(b) the income, earning capacity (if any), property and other financial resources of the child;
(c) any physical or mental disability of the child;
(d) the standard of living enjoyed by the family before the breakdown of the marriage;
(e) the manner in which he was being and in which the parties to the marriage expected him to be educated or trained.

The second major change is that rules are laid down as to the age when support obligations cease. Periodical payments, lump sum orders, and orders for the transfer of property cannot normally be made in respect of a child over seventeen, and existing orders must determine when the child attains eighteen unless [31]:

> " the child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or there are special circumstances which justify the making of the order or provision."

The " special circumstances " will often be ill-health, but there may be other cases where an order would be made, *e.g.* if a father had promised to maintain his son until he was called to the Bar. The normal periodical maintenance order will only extend until the school leaving age,[32] but the court has an unfettered jurisdiction to extend the award beyond that to the age of eighteen.[33]

There is no limit on the age at which a child may take benefits under a settlement of property which is ordered to be made [34] nor does his ability to benefit under a variation of settlement depend on age.[35] Thus what cannot be done directly can be done indirectly.

These changes are open to two major criticisms. First, the chaos of enactments dealing on different principles with child support obligations is worsened. A child may have (different) rights under the new Act, the Affiliation Proceedings Act 1957, the Guardianship of Infants Act, and the Matrimonial Proceedings (Magistrates' Courts) Act 1960. Only a few examples of the confusion can be given: (a) the new Act does not amend the definition of " child of the family " in the Matrimonial Proceedings (Magistrates'

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[30] s. 5 (2).

[31] s. 8.

[32] s. 8 (2).

[33] s. 8 (1).

[34] s. 4 (*b*).

[35] s. 4 (*c*).

Courts) Act 1960.[66] That definition therefore still depends on acceptance into the family so that a child who has been brought up in the erroneous belief that he is the child of both spouses will be denied maintenance in magistrates' court proceedings, although he would be eligible to receive it in High Court proceedings; (b) the age limits for the different jurisdictions vary: in no circumstances can an affiliation order extend beyond the age of twenty-one but a High Court order, whether the child is legitimate or illegitimate, may (in limited circumstances) do so. An application under the Guardianship of Infants Act can only be made to a magistrates' court for a child of sixteen or more if he is physically or mentally incapable of self-support[67]; if financial support for education is sought for a healthy seventeen year-old, an application under the Guardianship of Infants Act can be made but only to the High Court or county court.[68] However, if one of the grounds (including wilful neglect), under the Matrimonial Proceedings (Magistrates' Court) Act can be made out, application may still be made to the *magistrates'* court as well as to the High Court under one of the grounds in the 1970 Act. When the Family Law Reform Act 1969 lowered the age of majority, complex provisions were introduced to ensure that the laws were not changed any more than was necessary before the Law Commission's report on financial relief in matrimonial proceedings could be considered.[69] Now that the report has appeared, nothing has been done to rationalise and simplify the legislative jigsaw puzzle. Instead, new complexity has been introduced: the lay social worker, for instance, may be forgiven for not immediately noticing that a child of sixteen or over who is receiving professional training is only a dependant under the Matrimonial Proceedings (Magistrates' Court) Act if " he is required to devote the whole of his time to that training for a period of not less than two years "; under the 1970 Act he qualifies whether or not the training lasts for two years, and whether or not he is also in gainful employment. The criticism is not that the new provision is not an improvement, but that the opportunity was not taken to rationalise the whole system.

The second objection is one of principle. Insufficient consideration was given to the question of the maximum age for child support obligations. The Law Commission's premiss was that " maintenance obligations of parents should normally end at the age of majority at the latest." [70] No doubt there would be widespread agreement that they " normally " should, but it is arguable that it is better to leave the application of this social norm to the discretion of the courts rather than to impose a rigid bar, the only exception to which is a statutory "special circumstances" which may well receive elaborate judicial exegesis. The recommendation of the Latey Commission [91] (accepting the views of the President and judges of the Divorce division) that the courts should have power to make maintenance awards without limit of age was based on such reasoning. Yet this conflict between the recommendations of two bodies, both of which command respect, received no public discussion.

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[66] s. 16 (1).

[67] Guardianship of Infants Act 1925, s. 7 (1) (a).

[68] Guardianship of Infants Act 1886, s. 9; Guardianship and Maintenance of Infants Act 1951, s. 1.

[69] See Report, House of Commons Standing Committee B, April 22, 1969, cols. 63–64.

[70] Law Com. 25, para. 40.

Again, the position of a child of eighteen or more who seeks financial support is procedurally unsatisfactory: the Law Commission [92] recommended that the Rules of Court be altered so that with (but only with) the court's leave, such a child could intervene to seek financial provision in a suit between his parents. It was regarded as undesirable "to give a child (particularly an adult child) a power to take his parents to court to obtain finance because, for example, he wanted to embark on a scheme of training which they were not prepared to support." This is a social question, not a legal one, and its implications were not discussed. The Law Commission's view seems to apply principles which are, no doubt, valid in the normal united family but it is arguable that in the dysfunctional family a child who could reasonably expect financial support should not be prevented from applying for it merely because on this one issue his parents agree (possibly because the mother thinks her own maintenance will be reduced if the father has to support a child). Once again, there is an unjustifiable distinction depending on the court to which application is made: if, at any time during his minority, a child aged between eighteen and twenty-one has been the subject of a guardianship order, he (or either his parents) may apply to the court *in his own right* for a maintenance order against either of his parents until he attains twenty-one.[93] The order is unlimited in amount, but for purely historical reasons it is provided that no liability under the order shall accrue at a time when the parents are residing together, and that the order shall cease if they reside together for three months after the making of the order.[94] Whatever the case for giving a young person an independent right to be maintained, there seems no merit in making the duration of the right depend on the question of the intimate relationship between his parents.

There is an urgent need for a new children's maintenance code (to include illegitimate children), which will not only cut through the procedural maze of the existing provisions, but will also be based on a full and informed discussion of the policy issues involved. Merely consolidating the Guardianship of Infants Acts does not suffice.

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[91] Report of the Committee on the Age of Majority, Cmnd. 3342, para. 249.
[92] Law Com. 25, para. 42. [93] Family Law Reform Act 1969, s. 4 (2).
[94] Family Law Reform Act 1969, s. 4 (3).

B. Support Obligations and the Community

Society is concerned with support obligations in three different ways: first, there is the general principle that the machinery of the legal system should be effective, and that court orders should not be flouted. Secondly, the priorities between the claims of the family group and outside creditors must be adjusted. Thirdly, the extent of the state's readiness to underwrite support obligations, through the social security system, must be determined.

1. *Enforcement*

The Administration of Justice Act 1970 whilst abolishing imprisonment for most forms of civil debt, retains it as a sanction for failure to comply with a maintenance order.

It had been hoped that the attachment of wages system introduced by the Maintenance Orders Act 1958 would obviate the need for imprisonment as a sanction, but those hopes have not been fulfilled.

In 1958 there were 3,838 committals to prison by magistrates' courts for failure to comply with a maintenance order; in 1959 (after the coming into force of the attachment of wages procedure) the number fell to 1,649. Yet in 1966 there were 2,792, in 1967 2,614, and in 1968 2,561 committals.[95] The major problem has been the ease with which an attachment order can be evaded by a change of job, which automatically determines the order. Of a sample taken in 1966 of attachment orders made between February 1959 and January 1, 1966, 71 per cent. had been discharged. Of these over 50 per cent. had lasted less than six months, and 75 per cent. less than one year. Out of the total of discharged orders, 85 per cent. had been caused by the husband changing his job.[96] Thus, attachment has succeeded neither in keeping men out of prison nor in ensuring that their wives are maintained.

The Administration of Justice Act 1970 makes some attempt to improve the effectiveness of attachment. Under the 1958 Act, an attachment of earnings order could only be made if the payer *defaulted* for four weeks (and his default was due to wilful refusal and culpable neglect).[97] It was suggested that if an order could be made by consent, the payer might regard it as a convenient method of payment, rather than a punishment. The Act therefore allows[98] the debtor to apply for the making of an order. It is submitted that it would have been better if the court were empowered to make an order, provided the debtor does not object, rather than requiring a positive request.

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[95] Source: Table C.9, Report on the Work of the Prison Department 1968 (Cmnd. 4266, 1970).

[96] Report of the Committee on the Enforcement of Judgment Debts (Payne Committee), Cmnd. 3909, 1969, paras. 598, 601 and Appendix 2. (This appendix contains a most valuable account of work done on attachment orders by the Bedford College Research Unit, under the direction of Professor O. R. McGregor.)

[97] Maintenance Orders Act 1958, s. 6 (1) (2).

[98] Administration of Justice Act 1970, s. 14 (1) (*d*).

By their nature attachment orders cannot be effective against a debtor who is prepared to change his job in order to defeat the order. There is evidence that some debtors so bitterly resent the order that they are prepared to do almost anything (and certainly to change their job) in order to avoid payment. Of a sample of maintenance debtors imprisoned for non-payment, 21 per cent. said they did not intend to pay in future, 12·6 per cent. were doubtful, and 37·8 per cent. "gave replies that indicated that there was little likelihood of their paying unless they won the pools or came into some other unexpected fortune."[99] Those whose resistance to paying in any circumstances has taken them to prison are unlikely to be deterred from changing their job to avoid an attachment order. This problem may be mitigated by the provisions[1] of the Administration of Justice Act 1970 which require an employer who finds out that an attachment order has previously been made against the debtor to inform the court that he has become the employer; the court will then be able to vary the order (which is thus not automatically discharged) by directing it to the new employer.[2] It may also be possible by administrative machinery to make use of the R45 Income Tax form to ensure that an employer has notice of the existence of an order.

A further reason for disobedience to maintenance orders is that they are too often made without adequate information about the debtor's means. It is significant that 32·8 per cent.[3] of a sample of wives of men imprisoned for non-payment of maintenance gave as their reason for the failure the fact that he could not support two families. The Administration of Justice Act[4] enables the court to order the debtor to give full details of his earnings, and (more importantly) to provide a statement of earnings and anticipated earnings. It has already been suggested that there is need for a more inquisitorial approach to the family circumstances at an early stage of the proceedings, but this new power may be useful in preventing unrealistic orders being made.

Nothing, however, will prevent the really determined man from flouting a maintenance order, nor is such an order available in the case of the self-employed. The latter might be dealt with by enabling maintenance arrears to be proved in bankruptcy, but nothing can be done with the former. The cost of a system under which society pays not only for the debtor's "yearly pilgrimage"[5] to jail, but also supplementary benefits for the family entitled under the order, and the prisoner's other dependants, is very high.

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[99] Morris, *Prisoners and their Families* (1965), p. 242.
[1] Administration of Justice Act 1970, s. 21.
[2] Administration of Justice Act 1970, s. 18 (4).
[3] Morris, *op. cit.*, p. 254.
[4] s. 20.
[5] Morris, *op. cit.*, p. 237.

It is a matter of opinion [6] whether respect for court orders really requires it, when (apparently) this sanction is not required for those (admittedly fewer) who deliberately flout court orders to pay civil debts.

2. *Adjustment of priorities*

English law has traditionally deferred a man's obligations to his family to those of his commercial creditors: thus, a wife's right of occupation of the matrimonial home is not available against his trustee in bankruptcy; maintenance arrears are not provable in bankruptcy; transfers or settlements of property, even although made under court order, are still liable to be set aside under section 42 of the Bankruptcy Act 1914; loans between spouses are not normally recoverable in bankruptcy unless the general body of creditors has first been paid. Paradoxically, the Administration of Justice Act seems to espouse a different principle: if there are competing attachment orders a maintenance order is paid *in priority* to ordinary civil debts. There may be a valid distinction between current support rights and obligations on the one hand and the distribution of capital assets and liabilities with which bankruptcy is concerned on the other. Yet the contents of the matrimonial home can (with certain minor exceptions) be seized in execution of a commercial debt (and sold for a knock-down price) without regard for the welfare of the family. The complaint is that the problem has not been systematically thought out: there is something to be said for each principle, but they cannot both be accepted.

3. *The State guarantee*

Up to the limit of a wife's entitlement under the supplementary benefit scheme the State now, by administrative practice, underwrites family support obligations: the woman authorises payments made to the Court to be handed over to the Supplementary Benefits Commission,[7] which then provides her with a book of orders for the full supplementary benefit cashable at her local post office. However, supplementary benefit is still pitched at a subsistence level: the question is whether something should not be done to guarantee a more adequate allowance in the special (and long-term) circumstances of the broken family. One minor reform would be to allow the court (irrespective of the wife's eligibility for supplementary benefit) to pay out the maintenance award up to a certain maximum, pitched at a "moderate but adequate" (rather than subsistence) level, whether or not payments have been received from the husband. If it proved impossible for the court ultimately to recover, the community would pay. A committee has been set up to consider the special problems of one-parent families.[8] No doubt here as elsewhere the major problem will be the cost of making better provision. It is to be hoped that in considering the amount which can be allotted for this purpose, the substantial subsidy given by the community through the tax system to the more affluent broken family will be brought into account. Although the splitting of income for surtax purposes between individuals was made impossible by the Finance Act 1965, an exception to that prohibition exists in the case of provision by one party to a marriage for the other after the dissolution or annulment of the marriage, or while they are separated under an order of a court or under a separation agreement or in such circumstances that the separation is likely to be permanent.[9] Thus (to take an extreme example) a man liable to income tax and surtax at the maximum rate can provide the first £325 of his wife's allowance at an effective cost to himself of £28 8s. 9d., the Revenue in effect paying the balance: he will pay her £325 less income tax, and will be allowed to deduct the gross payment in computing his income for surtax purposes. She will then recover the income tax attributable to this sum. The State has thus already financed his maintenance obligation to an extent not significantly less than the annual cost of supplementary benefit. The next £2,175 paid by him will be treated in the same way, but since she will be liable to income tax at the standard rate on this sum the tax lost to the community is only the surtax (£1,087 10s.). Above £2,500 the income will be liable to surtax in the wife's hands, but still at a lower rate than in her husband's hands, so that the taxpayer continues to provide a subsidy.[10] As Lord Hodson put it, extra-judicially: "the odd situation has now come on us in which a man of large means who paid surtax was able to have several wives and to be very little worse off . . . whereas a working man who paid neither surtax nor any considerable amount of income tax found it quite impossible to comply with the law."[11] Once again the system works without coherence: settlement of capital (even if made by court order) in favour of a former spouse and children may involve the settlor in a liability to capital gains tax if the assets settled have appreciated in value since acquisition.[12]

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[6] See *e.g.* the diversity of opinion amongst members of the Payne Committee (*supra*).

[7] See Report of the Ministry of Social Security for 1967 (Cmnd. 3693, 1968), para. 38. It is not clear whether this practice is universal. Marsden (*op. cit.*, p. 156) reports that in one town the magistrates' clerk objected to the system and refused to co-operate: he did not see why women on supplementary benefit should be better off than others, thought that the procedure of taking enforcement action encouraged women to keep an interest in their husbands, and gave the husbands an incentive to pay.

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[8] See proposals for Earnings Related Social Security (Cmnd. 3883, 1969), para. 42.

[9] Income and Corporation Taxes Act 1970, s. 467 (1) (c).

[10] Nothing is known about the cost: in 1959 Wheatcroft estimated that it might (then) have been as much as £10 million per annum: [1959] B.T.R. 391, 395. For a clear account of the complex tax law affecting separated and divorced persons, see Potter and Monroe, *Tax Planning* (6th ed.) Chap. 2, and for a full (though by now somewhat dated) account of the way the tax system operates in this field, Titmuss: *Income Distribution and Social Change* (1962).

[11] *The Times*, July 31, 1957, cited Titmuss, *op. cit.*, p. 77.

The true cost of providing tax concessions to the separated should be estimated; it should then be decided whether this concealed subsidy could not be more equitably divided on the basis of need. The only thing that can be said in favour of the present anomalous tax treatment of the family unit is that it follows the pattern unfortunately set in other branches of the law relating to family financial problems.

STEPHEN CRETNEY.*

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[12] See the discussion of this problem in Law Com. 25, para. 77.

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REPORT OF COMMITTEE

THE WAY AHEAD: REPORT BY THE ASSOCIATION OF CHILD CARE OFFICERS ON THE ADOPTION OF CHILDREN

ADOPTION is a comparatively modern and rapidly developing institution. There is a danger that it may be used excessively. We may not appreciate the psychological stress upon the child and the parties involved. The interests of the child have not yet been established as the sole consideration, for the rights of the parents must still be considered, although parenthood should confer only duties and not rights. The Association of Child Care Officers (A.C.C.O.) set up a committee to make a fundamental inquiry of adoption law and practice, and a most challenging document is the result.

It is a curious fact that approximately one-third of all adoptions are family adoptions, *i.e.* adoptions by the mother, or the mother and stepfather, or relatives. The legal institution of adoption is being used in a way not originally envisaged to overcome certain legal or social disabilities. The mother of an illegitimate child may be trying to exclude the father for ever; relatives, *e.g.* the father's parents, may be trying to exclude the mother; the mother may be trying to gain security of succession rights for the child by creating a legal bond with the stepfather; the mother may be trying to overcome the shame of illegitimacy; old relatives may have no hope of adopting a stranger because of age. These motives may not be laudable and may not be in the child's best interests in certain cases. The putative father may have a genuine concern for the child; excluding a mother is a serious step; the law can do little to improve a personal relationship, the marriage with the stepfather may break down, and anyway the child now has certain succession rights against the putative father on intestacy and under family provision; the stigma of illegitimacy cannot be overcome by legal artifice but by the development of responsible social attitudes; older people should not be permitted to overcome the inevitable disability of their age at the possible expense of a child. Accordingly A.C.C.O. propose that in the family situation the law of guardianship, which is flexible and variable, should be utilised instead of adoption. Adoption has been looked upon too readily as a legal panacea when its relationship with fostering and guardianship and better facilities for illegitimate mothers should be more carefully thought out.

The third party placement and the direct placement should manifestly be prohibited. The motives of the parties may be suspect, the mother might maintain contact with the child and no objective social skill is used in the selection process. The only possible justification for the present system is that a mother might otherwise be unwilling to place the child through an authorised adoption agency and thus the child would lose the chance of any form of adoption; but adoption agencies must meet this challenge by gaining universal public confidence through the quality of the service offered.

Adopters want to give themselves to the child from the moment of placement but find themselves plagued by uncertainty, which is often communicated to the child, because they may be faced with a vacillating mother. She may withdraw consent before the order comes to be made and the court may be reluctant to dispense with her consent, because the reasonableness of the mother is a relevant factor in addition to the welfare of the child. Accordingly A.C.C.O. sensibly propose that consent should be witnessed by a lawyer and should become irrevocable after twenty-eight days (provided that at least six weeks have passed since the birth); the child would not even be placed with the adopters until it was free for adoption, *i.e.* beyond recall by the mother. Similarly the child should not be placed before any necessary dispensation had been given. The difficulty is that the vacillating mother is not a very common phenomenon and the proposal would prevent placement at a very early stage in the child's life.

If we should look to parenthood rather than legitimate parenthood then logically the consent of the putative father should be required. A.C.C.O. recognise this logic but recommend only improved procedures for better informing him of his existing rights, *e.g.* to apply for custody. An alternative solution, which A.C.C.O. would prefer to see, would be to introduce the institution of recognition into English law so that the willing father could openly assume parental rights, *e.g.* consent required for adoption, and the corresponding duties.

Contraception, a high incidence of marriage and a constant level of sterility have together meant that demand will continue to far outstrip supply, so rigid conditions may be imposed upon applicants. A.C.C.O. propose that a medical clearance should be required before initial placement, that single applicants be totally debarred and that married applicants should have been married at least three years. The only liberalising change proposed is that twenty-one instead of twenty-five should become the minimum age, a sensible recognition of earlier maturity and earlier marriage in contemporary society.

The magistrates' courts are condemned as a forensic forum for the adoption order because of criminal associations in the public mind, the inconsistency of practice and the lack of legal expertise. The county court is recommended as the sole forum, pending the establishment of properly constituted local family courts, which should now follow upon the creation of the new Family Division of the High Court.

ALEC SAMUELS.

NOTES OF CASES

DISCRETIONARY TRUSTS—AN END AND A BEGINNING?

THE decision of the House of Lords in *McPhail* v. *Doulton* [1] brings to an end one chapter in the history of discretionary trusts and may constitute the beginning of another.

It brings to an end the rule in *I.R.C.* v. *Broadway Cottages Trust* [2] that to be valid, a discretionary trust must specify an ascertainable class of *cestuis que trust*. This decision led to a series of cases in which discretionary settlements in favour of employees, ex-employees, dependants, etc., were brought before the court to have their validity determined.[3] In such cases it had to be decided, as a matter of construction, whether the income or capital of a trust fund was primarily subjected to a discretionary trust (otherwise termed " trust power," " power in the nature of a trust," or " power coupled with a duty "), or to a mere (" bare," " collateral ") power of appointment. If the provisions constituted a trust, its objects had to be ascertainable; but if they constituted a power, it would be valid if the objects were so defined as to meet the test laid down in *Re Gestetner Settlement* [4] that it can be said of any given person either that he comes within the class or not.

In 1968, in *Re Gulbenkian's Settlements*,[5] four out of five members of the House of Lords approved the *Broadway Cottages* rule,[6] although their decision was admittedly *obiter* on this point.[7] Two years later, in *McPhail* v. *Doulton*, three out of five members of the House of Lords rejected it.[8] The other two—who were two of the four who had supported the rule in *Gulbenkian's* case—delivered dissenting judgments strongly reiterating their view.[9] The decision of the majority on this point was expressly treated as part of the *ratio decidendi* in *McPhail's* case.[10]

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[1] [1970] 2 All E.R. 228.

[2] [1955] Ch. 20.

[3] *Re Sayer Trust* [1957] Ch. 423; *Re Eden* [1957] 2 All E.R. 430; *Re Hain's Settlement* [1961] 1 All E.R. 848; *Re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 2 All E.R. 904; *Re Leek* [1969] 1 Ch. 563.

[4] [1953] Ch. 672.

[5] *Sub nom. Whishaw* v. *Stephens* [1970] A.C. 508.

[6] [1970] A.C. 508, 524–525 (Lord Upjohn), with whose judgment Lord Hodson and Lord Guest entirely agreed (p. 520), and whose judgment on this point was approved by Lord Donovan (pp. 526–527). Lord Reid dissented (pp. 519–520).

[7] *Whishaw* v. *Stephens* [1970] 508, 523 (Lord Upjohn); *McPhail* v. *Doulton* [1970] 2 All E.R. 228, 232 (Lord Hodson), 236, 238 (Lord Guest).

[8] Lord Wilberforce delivered the judgment of the majority—[1970] 2 All E.R. 228, 238–247. His judgment was entirely approved by Lord Reid (p. 230) and Lord Dilhorne (p. 233).

[9] [1970] 2 All E.R. 228, 230–235 (Lord Hodson), 235–238 (Lord Guest).

[10] [1970] 2 All E.R. 228, 232 (Lord Hodson), 244 (Lord Wilberforce).

McPhail's case arose out of the provisions of a deed by which the late Bertram Baden set up a trust fund and directed that his trustees " shall apply " the income " at their absolute discretion " for the benefit of a company's " officers and employees or ex-officers or ex-employees . . . or any relatives or dependants of any such persons." Other provisions of the deed stated that the trustees need not expend the income of any one year or other period, and that no person should have any " right title or interest " in the fund.

At first instance Goff J. construed these provisions as a power.[11] He held the power valid within the *Gestetner* rule, applying the wide interpretation of that rule adopted by members of the Court of Appeal in *Gulbenkian's* case.[12] According to this wide version, a power is valid if the objects are so specified that *any* individual can be found who certainly comes within them.

The majority of the Court of Appeal in *Baden's* case found that the arguments in favour of construing the provisions as a trust or as a power were evenly balanced. Since, however, if they constituted a trust it would almost certainly fail for uncertainty, they construed them as a power, applying the maxim *ut res magis valeat quam pereat.*[13] Meanwhile the House of Lords in *Gulbenkian's* case had re-established the narrower interpretation of the *Gestetner* rule, namely, that to be valid the objects of a power must be so defined that it can be said of *every* person whether or not he comes within them.[14] Accordingly, the Court of Appeal in *Baden's* case ordered the provisions to be resubmitted to the Chancery Division for determination whether, on the evidence, they passed the narrower version of the *Gestetner* test.

On the general merits of the *Broadway Cottages* rule, Harman L.J. said [15]:

> " As the argument proceeded before us, I felt an ever greater sense of frustration for it seemed to me that, if ever there was an empty question, it was this one, and that it ought to make no difference to the validity of the provisions of the deed whether upon a minute analysis of the language used in this deed it should be construed as creating a trust or a power and that the court must come down on one side of the line or the other. It ought to make no difference to the deed's validity and that it does is an absurd and embarrassing result brought about by a line of cases in recent years stemming I am sorry to say from my own decision in *Re Gestetner Settlement.* . . ."

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[11] *Re Baden's Deed Trusts* [1967] 3 All E.R. 159.

[12] *Re Gulbenkian's Settlements* [1968] Ch. 126, 133–134 (Lord Denning M.R.); 138 (Winn L.J.).

[13] *Re Baden's Deed Trusts* [1969] 2 Ch. 388, 399–400 (Harman L.J.); 402 (Karminski L.J.). Russell L.J. dissented (p. 400).

[14] *Whishaw* v. *Stephens* [1970] A.C. 508, 518, 520, 525. Only Lord Donovan reserved his opinion on this point (p. 526). The writer has discussed the development of divergent interpretations of the *Gestetner* test in an earlier note: (1968) 31 M.L.R. 211.

[15] [1969] 2 Ch. 388, 397.

It is submitted that this frank admission correctly evaluates the effect of the *Broadway Cottages* rule. It is strange indeed to recall how often judges, who saw the rule as an inescapable part of doctrine, regretted it on policy grounds. Jenkins L.J., in delivering the judgment of the Court of Appeal in *I.R.C.* v. *Broadway Cottages Trust*, admitted that it was contrary to common sense.[16] Of the dissenting members of the House of Lords in *McPhail's* case, Lord Hodson said that it could tend to absurdity,[17] and Lord Guest said that it was contrary to the public interest and ought to be changed by statute.[18]

The writer has sought to show elsewhere [19] that the explanation for this divergence between what the courts would do and what they felt they could do, lies in their presuppositions about the concept of duty. It has been submitted that, both in the case of the development of the *Broadway Cottages* rule, and in the development of the rule against pure purpose trusts,[20] it has been unnecessarily assumed to be axiomatic that trustees must owe an active duty to a defined class of rightholders.

The personal representatives of Bertram Baden appealed from the decision of the Court of Appeal to the House of Lords, *sub nom. McPhail* v. *Doulton*. The five members of the House all agreed in allowing the appeal on the question of construction, having no doubt that it was a trust.[21] They too ordered the provisions to be resubmitted to the Chancery Division; but whereas the two dissenting members thought that the test to be applied there was the *Broadway Cottages* test—which would mean that the provisions would almost certainly fail [22]—the majority said that it should be a test " similar to " the *Gestetner* test as interpreted by the House of Lords in *Gulbenkian's* case [23]—which means that the provisions may well be valid.[24]

Lord Wilberforce, delivering the judgment of the majority, had to deal with the original reason given in the *Broadway* case for the rule established there—a reason repeated in the dissenting judgments in *McPhail's* case—namely, that a discretionary trust in favour of unascertainable objects was not a trust which the court could " control and execute," [25] because, if the trustees failed to exercise their discretion, the court could not direct an equal distribution among the beneficiaries. He said of this argument:

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[16] [1955] Ch. 20, 30.

[17] [1970] 2 All E.R. 228, 234.

[18] [1970] 2 All E.R. 228, 236.

[19] In an article which is due to appear in [1971] 87 L.Q.R.

[20] *Re Astor's Settlement Trusts* [1952] Ch. 534; *Re Shaw* [1957] 1 All E.R. 745; *Leahy* v. *Att.-Gen. for N.S.W.* [1959] A.C. 457; *Re Endacott* [1960] Ch. 232.

[21] [1970] 2 All E.R. 228, 230, 231, 235, 238, 241.

[22] This at least was the view of the Court of Appeal—[1969] 2 Ch. 388, 397, 399, 400.

[23] [1970] 2 All E.R. 228, 244, 246–247.

[24] [1969] 2 Ch. 388, 399, 400.

[25] [1955] Ch. 20, 31, 32, 35 (Jenkins L.J.); [1970] 2 All E.R. 228, 232 (Lord Hodson).

> "Assuming, as I am prepared to do for present purposes, that the test of validity is whether the trust can be executed by the court, it does not follow that execution is impossible unless there can be equal division. As a matter of reason, to hold that a principle of equal division applies to trusts such as the present is certainly paradoxical. Equal division is surely the last thing the settlor ever intended; equal division among all may, probably would, produce a result beneficial to none. Why suppose that the court should lend itself to a whimsical execution?[26] . . . The court, if called on to execute the trust power, will do so in the manner best calculated to give effect to the settlor's or testator's intentions. It may do so by appointing new trustees, or by authorising or directing representative persons of the classes of beneficiaries to prepare a scheme of distribution, or even, should the proper basis for distribution appear, by itself directing the trustees to distribute."[27]

This constitutes an assumption of a jurisdiction which the courts of equity have denied themselves since the beginning of the nineteenth century, when it was established that, if discretionary trustees failed to carry out their trust, the court could do nothing except direct an equal distribution.[28] Before the restrictive days of Lord Eldon's court, Chancery judges had from time to time assumed a free-swinging jurisdiction to exercise the discretions which settlors conferred on trustees. *McPhail's* case has revived the authority of these cases.[29]

Lord Wilberforce laid particular stress upon the case of *Richardson* v. *Chapman*,[30] a case which Anthony Trollope cannot have read since he would undoubtedly have made it the basis of a novel. Dr. John Potter, Archbishop of Canterbury, bequeathed his rights to the presentation of various benefices in the Church to his executors in trust, to appoint the same according to their discretion, among a class of persons which included "my present and former chaplains and other domestics" and "my worthy friends and acquaintances." The surviving executor, Dr. Chapman, after various machinations, purported to appoint one of the livings (which he was anxious to obtain for himself) to a collaborator, with a view of exchanging it later on. The House of Lords set aside this corrupt appointing and directed Chapman to exercise his discretion in favour of Dr. Richardson, one of the objects named in the will, apparently accepting the arguments adduced to show that he was the candidate the testator would have preferred.[31]

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[26] [1970] 2 All E.R. 228, 241–242.

[27] [1970] 2 All E.R. 228, 248.

[28] *Kemp* v. *Kemp* (1801) 5 Ves. 849; *Brown* v. *Higgs* (1800) 4 Ves. 708; 5 Ves. 495; (1803) 8 Ves. 561.

[29] *Moseley* v. *Moseley* (1673) Rep.Temp.Finch 53; *Clarke* v. *Turner* (1694) Freem.Ch. 198; *Warburton* v. *Warburton* (1702) 4 Bro.P.C. 1; *Harding* v. *Glyn* (1739) 1 Atk. 469; *Richardson* v. *Chapman* (1760) 7 Bro.P.C. 318.

[30] (1760) 7 Bro.P.C. 318.

Does this mean that courts of equity will now, in private discretionary trusts as in charitable trusts, begin to exercise a regular control over trust funds by directing schemes? Probably they will not. For there was one underlying factor in the line of cases from *Broadway* to *McPhail* which lent the trust-power issue a peculiar air of unreality. In none of them did the trustees actually refuse to exercise the discretion vested in them. It is unlikely that trustees of employees' funds are going to do so in the future.

In the search for an active duty which would be generically appropriate to discretionary trusts and which would distinguish them from mere powers, the courts have referred sometimes to a "duty to distribute,"[32] sometimes to a "duty to survey."[33] In *McPhail's* case Lord Wilberforce said that, whereas trustee powerholders have only a "duty to consider," trustees with a discretionary trust have a "duty of inquiry or ascertainment."[34] This is apparently the reason why the test for certainty of objects is "similar to" rather than "identical with" the *Gestetner* test—for if the tests were identical, it would still be possible for the court to adopt one of Lord Wilberforce's methods of exercising the trustees' discretion in the case of an unexecuted discretionary trust.

What difference in practice there could be between "considering" and "inquiry or ascertainment" it is difficult to know. Lord Wilberforce did, however, suggest, though he did not stipulate, that a discretionary trust in favour of "all the residents of Greater London" might not be allowed.[35]

Nothing was said in *McPhail's* case about the rule prohibiting pure purpose trusts. The reason generally given for this rule is that they also are trusts which the court could not "control and execute."[36] This may mean either that the court cannot directly execute them because it cannot carry out the trust if the trustees fail to do so, in which case *McPhail* v. *Doulton* has removed the *raison d'etre* of the rule; or it may mean that the court has no control over the trust property since there is no one with *locus standi* to apply to the court if the trustees fail to carry out the

[31] *Ibid.*, 827. The House of Lords gave no reasons for its decision in this case; but it must be assumed that it preferred the view put forward for the appellant—"Wherever a trustee becomes incapable of performing his duty, it is the office of the court to interpose and guide him; whether his incapacity proceeds from weakness or corruption" (p. 828)—to that put forward for the respondents—". . . no court of justice is capable of trying the merits of the several candidates . . . because the court cannot obtain by any possible method, that knowledge of the parties, and their circumstances, which is absolutely necessary to decide in the choice" (p. 828).

[32] *Whishaw* v. *Stephens* [1970] A.C. 508, 524–525.

[33] *Re Gestetner Settlement* [1953] Ch. 672, 684, 688–689.

[34] [1970] 2 All E.R. 228, 247.

[35] *Ibid.*

[36] *Re Astor's Settlement Trusts* [1952] Ch. 542, 543, 547; *Re Endacott* [1960] Ch. 232, 246.

trust.[37] In *Re Denley's Trust Deed*,[38] the latter view was taken, and it was said that so long as a purpose trust indirectly benefited a class of persons who were ascertainable within the *Broadway Cottages* rule, it would be valid. On this view *McPhail's* case has had at least this much effect: purpose trusts will be valid provided that they indirectly benefit persons who are ascertainable within a test " similar to " the *Gestetner* test.

J. W. HARRIS.

A MAZE NOT A MOTORWAY [1]

Home Office v. *Dorset Yacht Co. Ltd.*[2] raised the preliminary [3] question whether the Home Office would be liable for damage to a yacht suffered in a collision with another unlawfully operated by seven escaping Borstal trainees. In breach of instructions their three custodians had gone to bed, leaving the trainees unsupervised.

The Home Office asserted that there was no authority [4] for a duty owed by the officers to the public. As a counter the company relied on Lord Atkin's dictum in *Donoghue* v. *Stevenson*.[5] Such an invitation to adopt what Karl Llewellyn would call the Grand Style [6] was readily accepted by Lord Denning M.R. in the Court of Appeal. " This talk of ' duty ' or ' no duty ' is simply a way of limiting the range of liability for negligence." [7] In the Lords too, Lord Morris pointed out that " precedents do not fix the limits of what may be called duty situations; they illustrate them " [8] and Lord Pearson thought that " to some extent the decision in this case must be a matter of impression and instinctive judgment as to what is fair and just . . . this case ought to and does come within the *Donoghue* v. *Stevenson* principle unless there is some sufficient reason for not applying the principle to this case." [9]

Clearly the fact that the officers owed a duty to the Crown did not exclude the principle [10]; the main argument was rather that without an immunity in tort an "open Borstal system" would be virtually impossible as the authorities would be too timid to experiment if there was a risk of negligence liability.[11] Lord Reid believed Her Majesty's servants to be "made of sterner stuff." [12] Lord Denning M.R. was at pains to point out that an action would only lie on proof of negligence and that "it is not negligence to keep an open Borstal." [13] Nor, as Lord Reid pointed out, has *Greenwell's* case been followed by a series of claims.[14]

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[37] That the settlor or those representing his estate have sufficient *locus standi* for this purpose was denied by Roxburgh J. in *Re Astor's Settlement Trusts* [1952] Ch. 534, 542, but affirmed by Lord Evershed M.R. in *Re Endacott* [1960] Ch. 232, 246.

[38] [1969] 1 Ch. 373, 383.

[1] See Diplock L.J. in *Morris* v. *C. W. Martin & Sons Ltd.* [1965] 2 All E.R. 725, 734 D.

[2] [1970] 2 All E.R. 294.

[3] Regretted by Lord Diplock, *ibid.* at p. 323 D. Strangely, *Donoghue* v. *Stevenson* [1932] A.C. 562 itself was on a preliminary issue.

[4] Except the county court case of *Greenwell* v. *Prison Commissioners* (1951) 101 L.J. 486.

[5] [1932] A.C. 562, p. 580.

[6] *The Common Law Tradition*, 1960.

[7] [1969] 2 All E.R. 564, 567 C.

[8] [1970] 2 All E.R. 294, 307 A. See also Morison " A Re-examination of the Duty of Care " (1948) 11 M.L.R. 9.

[9] [1970] 2 All E.R. 294, 321 C.

[10] See *ibid.* at p. 300 H *per* Lord Reid, [1969] 2 All E.R. 564, 566 G. *per* Lord Denning M.R.

Some of their Lordships sat somewhat uneasily astride the "unruly horse." [15] Lord Morris doubted "whether it is necessary to say, in cases where the court is asked whether in a particular situation a duty existed, that the court is called upon to make a decision as to policy. Policy need not be invoked where reason and good sense will at once point the way." [16] Surely the exercise of discretion is always "at bottom a matter of public policy" [17]? The test of reasonable foresight was justly criticised by Viscount Dilhorne in his dissenting judgment [18]; there cannot be a duty in law whenever damage can be foreseen, otherwise there would be an affirmative duty to rescue, a duty to fence and a duty to be careful for foreseeable trespassers. Lord Morris however seemed to argue that this vague test could be applied without policy being invoked.[19] In the normative realm of torts, foresight can have no definite meaning; all depends on the judicial view of what standard it is reasonable to require.

Lord Reid treated the case as one of remoteness. The tautologous nature of the traditional tripartite analysis has long been appreciated [20] and there could be no objection to saying that the damage was of a type and occurred in a manner that was broadly foreseeable. Lord Reid concentrated on whether the fact that the damage was caused by the criminal acts of the Borstal trainees broke the chain of causation. Remarkably he did not ask whether the trainees' acts were reasonably foreseeable but whether they were "very likely" to occur.[21] With respect, to say that it is "very likely" is merely to say that the foresight test, properly applied in this situation, only requires the defendant to take precautions against fairly obvious risks, and one is leaving unsaid the policy reason that to hold otherwise would unduly hamper the

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[11] Such an argument succeeded in *Williams* v. *New York State*, 127 N.E. (2d) 545 (1955).

[12] [1970] 2 All E.R. 294, 302 J.

[13] [1969] 2 All E.R. 564, 568 F.

[14] [1970] 2 All E.R. 294, 302 E.

[15] See *Richardson* v. *Mellish* (1824) 2 Bing. 229, 252 *per* Burrough J.

[16] [1970] 2 All E.R. 294, 307 J.

[17] [1969] 2 All E.R. 564, 567 C. *per* Lord Denning M.R.

[18] [1970] 2 All E.R. 294, 311–312.

[19] *Ibid.* at p. 307 G.

[20] See Winfield, "Duty in Tortious Negligence" (1934) 34 Col.L.R. 41, *Select Legal Essays*, p. 70., *The Wagon Mound* (*No.* 1) [1961] 1 All E.R. 404. and [1970] 2 All E.R. 294, 319 B *per* Lord Pearson.

[21] *Ibid.* at p. 300 D.

"open Borstal" system. It is a little ironic that after six pages Lord Reid started his last paragraph with "Finally, I must deal with public policy."[22]

Most of their Lordships[23] simply endorsed the view of Dixon J. that "the general rule is that one man is under no duty of controlling another to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature."[24] Viscount Dilhorne was alone[25] in refusing to recognise the relationship between the borstal officers and the trainees as such a "special relation."

Lord Dilhorne's dissent is an example of Llewellyn's Formal Style.[26] He was concerned "not with what the law should be but with what it is. The absence of authority shows that no such duty now exists. If there should be one that is . . . a matter for the legislature and not for the courts."[27] *Ellis* v. *Home Office*[28] was distinguished as there was there no "escape," the injury occurred within the prison.[29] Surprisingly the materiality of this distinction was not considered.

In a careful judgment, Lord Diplock analysed "the function which judges hesitate to acknowledge as law making"[30] and demonstrated the need for both Grand Style and Formal Style judicial legislation.[31] In essence, the Home Office might be liable in negligence as the principle in *Ellis's* case can be rationally extended to such a case.[32] A series of such extensions might eventually result in a Grand Style restatement.[33] But there was for him an overriding consideration; the public interest was represented by the proper consideration of the statutory powers of the Borstal officers.[34] All the other judges[35] accepted that statutory authority is a defence unless there is negligence[36]; Lord Diplock however insisted that before the officers can be liable in negligence they must be acting *ultra vires* and the test of that is not reasonable foresight but whether any reasonable person could bona fide have made such a decision.[37] He thought therefore that *Greenwell's* case was decided on the wrong principle, negligence not *ultra vires*.[38] His judgment might cause some confusion, for he allowed the appeal whilst requiring this additional and more stringent test to be applied at a full trial. In his own terms [39] he was perhaps building a by-pass; the remainder of their Lordships have barely started their motorway.

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[22] *Ibid.* at p. 302 E.

[23] *Ibid.* at p. 307 E per Lord Morris, at p. 313 *per* Viscount Dilhorne, at p. 321 F. *per* Lord Pearson, at p. 323 B *per* Lord Diplock.

[24] *Smith* v. *Leurs* (1945) 70 C.L.R. 256, 261.

[25] [1970] 2 All E.R. 294, 314 B.

[26] See note 6.

[27] [1970] 2 All E.R. 294, 313 G.

[28] [1953] 2 All E.R. 149.

[29] He does in fact refer to *Read* v. *Lyons* [1946] 2 All E.R. 471. An "escape" is, of course, a prerequisite of liability in *Rylands* v. *Fletcher* and not a ground for an immunity.

[30] [1970] 2 All E.R. 294, 324 B.

[31] *Ibid.* at pp. 324 B–326 H.

[32] *Ibid.* at p. 334 G.

[33] *Ibid.* at p. 329 D.

[34] *Ibid.* at p. 332 A.

[35] *Ibid.* at p. 300 J. *per* Lord Reid, at p. 305 C. *per* Lord Morris, at p. 317 F. *per* Viscount Dilhorne, at p. 322 C *per* Lord Pearson.

[36] All relied on Lord Blackburn in *Geddis* v. *Proprietors of Bann Reservoir* (1878) 3 App.Cas. 430 at p. 455, which, in Lord Diplock's view, is only a correct statement of the law as far as private Acts are concerned as it would involve too frequent a review of the exercise of discretion, see [1970] 2 All E.R. 294, p. 330 G.

MAX WEAVER.

IS CONCEALMENT "CONDUCT"?

THE decision of the Court of Appeal in *Sullivan* v. *Sullivan* [1] is unlikely to have any profound significance but is nevertheless worthy of note on a number of counts. Not least is the characteristically witty judgment of Winn L.J. at the expense of the appellant husband who, in his Lordship's words "was not at his intellectual best, if he ever had a state of intellect which could be described as 'best'." [2]

The Sullivans were married in 1961, the husband returning to sea actually on the wedding day. A few days later he returned, discovered his wife to be pregnant and, as he had never at any time had intercourse with her, concluded that he was not the father and left for good. Unfortunately for him he was unaware that he could petition for an annulment of the marriage [3] provided he initiated proceedings within a year from the date of the marriage. In February, 1968, the wife petitioned for divorce on the ground that the husband deserted her in 1961; in her petition she asked for discretion, admitting adultery. However, her petition was subsequently abandoned, she could not be traced and the husband was unable to prove her adultery. Undaunted, he cross-petitioned on the ground of constructive desertion by his wife in that she had deceived him and come to him pregnant without his knowledge that that was her state. The Court of Appeal agreed with the county court judge that, to establish the offence of constructive desertion, there must be some misconduct during the marriage on the part of the spouse alleged to be guilty. The appeal accordingly failed.

On the question of nullity the case does no more than illustrate the rather arbitrary operation (no doubt necessarily so) of the statutory time limit. If, as was suggested, the mere fact that there is an express statutory remedy does not mean that there are no other grounds for relief, then, as regards nullity, this case is clearly met by *Moss* v. *Moss* [4] and no annulment is available simply on the ground that the wife misled her husband as to her state before the marriage.[5] The marriage was never consummated, but the husband could not rely on his own refusal nor would there seem to have been any inability, unless it were that of the husband *quoad hanc*. Doubtless there could be circumstances in which a husband might feel such revulsion towards his wife that he was quite incapable of consummating the marriage though, even if such revulsion were justified, to grant him a decree on this ground would be to extend considerably the principle in *Harthan* v. *Harthan*.[6]

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[37] *Ibid.* at p. 382 E.
[38] *Ibid.* at p. 383 G.
[39] See note 1.
[1] [1970] 2 All E.R. 168.
[2] *Ibid.* at p. 169.
[3] s. 9 (1) (*d*) of the Matrimonial Causes Act, 1965.

As to constructive desertion, it is difficult to quarrel with the conclusion that it must be founded upon misconduct during the marriage and that neither the wife's conceiving of another's child nor her concealing it from her husband at the time of the marriage could, following *Moss* v. *Moss*, amount to constructive desertion.[7] Nevertheless it does appear that after the marriage she continued to try to conceal the fact of her pregnancy from him. As counsel for the husband so colourfully put it, " she was incubating after the wedding the child of another man, intending, and indeed being bound in due course, to produce this as a bomb in the hold of the ship which would blow the wedding to smithereens." Do not the words " after the wedding " and " intending " suggest continuing fraudulent conduct? Might not the expulsive conduct have been the attempts at concealment after the wedding rather than the conception and deceit before it?

Some other interesting observations were made by the court, including a rather curious one by Winn L.J. apparently suggesting abortion as a remedy [8]; this would avoid the problem of the husband having to support the child, though it would scarcely right the wrong done to him or lessen his sense of grievance. Sir Gordon Willmer suggested that, though the wife's prayer for discretion did not enable the husband to obtain a divorce on the ground of her adultery, it would seem to give him good reason to believe that she had committed adultery and, on the *Baker* v. *Baker* principle [9] perhaps amount to constructive desertion. This might no doubt be so in certain circumstances but one would have thought that, for there to be constructive desertion, there must be some causal nexus between the conduct complained of and the fact of leaving. Here, the fact that the husband now has reason to believe in his wife's infidelity has clearly nothing to do with the fact that he left her nine years ago; nor, it is submitted, does the discovery turn a *de facto* separation into desertion since he had clearly decided already not to return. In any event, the three-year period would only commence to run when the husband was given reason to believe, *i.e.* when the wife petitioned in 1968. A more helpful suggestion might have been that the husband should petition under section 2 (1) (*e*) of the Divorce Reform Act 1969 as soon as it comes into operation.

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[4] [1897] P. 263.

[5] Although the point was not at issue in the present case and the decision was reached on the assumption that the husband was not the father of the child, one wonders precisely what standard of proof is required in such a case, bearing in mind that the status of a child is involved. The reluctance of the courts to order blood-tests which could result in a child being held to be illegitimate is in startling contrast to the readiness, in some cases, to accept the testimony of one or both of the parties, see *Smith* v. *May* (1969) 113 S.J. 1000. If a child is born within nine months of the marriage and the parties both desire to end the marriage what is there to prevent the husband obtaining a nullity decree under s. 9, thereby bastardising an innocent child?

[6] [1949] P. 115.

[7] *Quaere* whether it would provide a just cause for his leaving and, in consequence, a defence to her petition on the ground of his desertion.

[8] At p. 171.

[9] [1953] 2 All E.R. 1199; [1954] P. 33.

A. J. Easson.

Children in Care: The Real Issues

In *Re T. (A.J.J.) (An Infant)*[1] an order had been made by a juvenile court in 1962 committing a child who was then less than two years old to the care of a local authority as a "fit person"[2]; the court was satisfied that the child was in need of care and protection because she had been neglected in a manner likely to cause her unnecessary suffering.[3] The local authority boarded the child out[4] to foster-parents; subsequently it called on the foster-parents[5] to return the child since it was intended to allow her to be in the charge and care of her mother for a trial period, in the hope that a full mother and daughter relationship might be established.[6] In so doing, the authority was exercising a discretion conferred by statute on the basis that the move might or would be for the child's benefit.[7] The foster-parents refused to comply, made the child a ward of court, and sought an order continuing their care and control of the child. They failed, both before Ungoed-Thomas J.[8] and the Court of Appeal. The *ratio* of the decisions is that, as a matter of law, the Chancery judge in wardship proceedings cannot substitute his own views as to the best course to be adopted in relation to the care and control of an infant for the views of the local authority, when an order has been made and remains in existence in the authority's favour, and the course proposed by it is proposed pursuant to the powers and duties conferred and imposed by legislation.[9] This decision was almost inevitable, given the now settled rule [10] that the court will not interfere in a bona fide exercise of discretion by a local authority which has assumed parental rights over a child under a clear and comprehensive scheme of legislation, entrusting to it full discretion in such matters. The only point in the decision not entirely covered by authority is the assimilation for this purpose of the position of a local authority under a fit person order with that of an authority which has assumed parental rights under section 2 of the Children Act 1948. It would be remarkable if any other conclusion had been reached, given that the effect of a fit person order is to confer on the authority the same rights and powers as if it were the child's parent, and that the child is to remain in the care of the authority "notwithstanding any claim by a parent or any other person." [11]

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[1] [1970] 3 W.L.R. 315; [1970] 2 All E.R. 865. Subsequent page references are to the *All England Reports*.

[2] Under s. 62 of the Children and Young Persons Act 1933 (hereinafter referred to as "the 1933 Act"). This is to be repealed by s. 72 (4), and Schedule 6 of the Children and Young Persons Act 1969 (hereinafter "the 1969 Act") and replaced by the procedures laid down in the 1969 Act: see ss. 1, 20.

[3] s. 61 of the 1933 Act, as amended.

[4] As it was at the time obliged to do unless it was impracticable or undesirable to do so: ss. 11, 13 of the Children Act 1948 ("the 1948 Act"). Under the new s. 13 of the 1948 Act (introduced by s. 49 of the 1969 Act—see The Children and Young Persons Act 1969 (Commencement No. 2) Order 1969, S.I. No. 1565, 1969) the authority has a wider discretion.

[5] Who had given a statutory undertaking to do so: Boarding Out of Children Regulations 1955, S.I. No. 1377, 1955.

[6] *Per* Russell L.J. at p. 868 C.

[7] s. 5 (1) of the Family Allowances and National Insurance Act 1956, now replaced by a new s. 13 (2) of the 1948 Act: see note 4 *supra*. The new provision, unlike that of the 1956 Act no longer specifically requires that it should appear to the local authority that the handing over will or may be for the child's benefit, but this point is covered by s. 12 of the 1948 Act which imposes a general duty on the local authority to exercise its powers so as to further the child's best interests, and to afford him opportunity for the proper development of his character and abilities.

Yet it was this case which provoked a national uproar about a law which (it was said) favoured parental rights in preference to the welfare of the child. The law on that question had in fact been settled in February 1969 by a unanimous and unequivocal decision of the House of Lords [12] that in all custody cases (including disputes between parents and outsiders,[13] such as foster-parents) the first and paramount consideration is the welfare of the child, which must take priority over the claim of even an unimpeachable natural parent. The issue never arose in the instant case in which both the local authority and the judge (who heard full evidence on the facts and merits, even although on his view of the law they were irrelevant) considered that the trial return was justified in the interests of the child's welfare.[14]

The case primarily demonstrates the deplorable standards of press and television [15] journalism, which was used to agitate public opinion on an issue which the most rudimentary research would have shown not to exist. Such legal issues as the case raises would be classified by an old-fashioned conceptualist as belonging rather to that part of Administrative Law which is concerned with the control of discretionary powers, rather than to Family Law. The difficulty stems from the failure to integrate all legal powers relating to children in a single system. The ill-defined wardship jurisdiction is used in attempts to appeal in cases where a full investigation has already taken place. The cumbrous machinery of the Chancery Division is not well suited for this purpose (nor will it be altered by transferring it to the Family Division of the High Court, which is simply the Probate, Divorce and Admiralty Division under a new name).[16] Evidence is given initially on affidavit, and delay and expense are inevitable. In the present case, the hearing before Ungoed-Thomas J. involved solicitors, three counsel, and a judge for eleven days; in the Court of Appeal the four-day hearing involved three Lords Justices and no fewer than six counsel. The cost to the public cannot be less than £5,000,[17] a sum which would pay the annual salaries of several child care officers. Yet it is difficult to see how any of this expenditure contributed to the welfare of this (or any other) child; indeed it was shown how inadequate in practice is the machinery of the court to prevent the exploitation of one of its wards by an ignorant and hysterical press campaign.[18] At least the procedural delays in this case did not result in a decision contrary to the justice of the case, and the scope for abuse of the wardship jurisdiction is for the future somewhat limited by the Court of Appeal's insistence that the court should first of all investigate the limited issue of whether prima facie grounds (such as lack of good faith) exist which would exceptionally justify intervention by the court.[19]

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[8] [1970] Ch. 836.

[9] *Per* Russell L.J. at p. 867 B.

[10] *Re M.* (*an Infant*) [1961] Ch. 328; *Re B.* (*Infants*) [1962] Ch. 201.

[11] s. 75 (4) of the 1933 Act. The provisions of s. 24 (1) of the 1969 Act (which will replace it) impose a mandatory duty to "keep" a child committed by a care order notwithstanding any claim by his parent or guardian; s. 24 (2) empowers the authority to restrict the child's liberty "to such extent as the authority consider appropriate."

[12] *J.* v. *C.* [1969] 2 W.L.R. 540; [1969] 1 All E.R. 788.

[13] In reaching this conclusion their Lordships ignored the history of the Guardianship of Infants Act 1925: see Cretney (1969) 119 New L.J. 801.

[14] See *per* Russell L.J., p. 868 E.

Unfortunately it cannot be said that the principles on which the court decides whether to intervene in disputes between foster-parents, local authorities and natural parents are satisfactory. It is said that, notwithstanding the existence of the various statutory codes, the wardship jurisdiction always remains in existence, but the proper scope for its exercise is limited. On this basis, a distinction is drawn between the case of a child in care under section 1 of the 1948 Act on the one hand, and under section 2 [20] on the other: in section 2 cases the local authority assumes parental rights, and the court will not interfere with their bona fide exercise; in section 1 cases parental rights are unaffected, the Act providing that nothing in the section authorises a local authority to retain a child if any parent or guardian desires to take over his care.[21] The fact that the authority's power is transient under section 1 has been seized on by the courts to assert a full wardship jurisdiction, even at the suit of foster parents who have refused to comply with their statutory undertakings.[22] Paradoxically the result is that where the legislature has carefully left parental rights unaffected, they are most at risk to a possible claim to the High Court by foster-parents.

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[15] Typical was a BBC feature, in which harrowing film of the child's removal from the foster-parents' home was followed by a heated and ill-informed "discussion."

[16] Under the Administration of Justice Act 1970, for a criticism of which see Cretney, 114 S.J. 579.

[17] It is understood that the applicants were legally aided.

[18] See Peter Pringle: "The Truth about a 'child-snatch'," *The Sunday Times*, August 16, 1970, an excellent full acount of the relevant facts.

[19] *Per* Russell L.J., p. 870 E.

[20] Or a fit person or care order.

The basic problem is to ensure proper exercise of discretionary powers. The present system under which the High Court interferes sometimes, but not at others, is manifestly unsatisfactory. But it may be doubted whether the trend towards conferring virtually unrestricted powers[23] on local authority children's committees[24] is the best solution. A fully integrated social service might give formal weight to the views of professionally trained and experienced social workers, in conjunction with laymen with relevant experience. It is not clear why such decisions should be taken solely by a committee of those whose appeal to the electorate may not have been closely connected with the possession of the qualities needed to take decisions in this inevitably difficult type of case. Curiously, those who attack the existing law on the erroneous premiss that it gives " rights " to parents often suggest conferring precisely similar fixed and immutable rights on foster-parents. This is clearly inconsistent, apart from the fact that it would no doubt have an adverse effect on the implementation of the official policy of preferring fostering to institutional treatment for children in care. Discretion is essential, but the problem of ensuring that it is properly exercised is essentially one of social administration to which the superior courts have little to contribute.

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[21] s. 1 (3).

[22] *Re G. (Infants)* [1963] 1 W.L.R. 1169; *Re K. R. (An Infant)* [1964] Ch. 455; *Re S. (An Infant)* [1965] 1 W.L.R. 483. It is very difficult to reconcile these decisions with that of the Divisional Court in *Re A. B. (An Infant)* [1954] 2 Q.B. 385 ("If the parent wants the child and can look after it, let the parent have it": *per* Lord Goddard C.J. at [1954] 2 All E.R. 291 E—omitted from the *Law Reports* version). In *Krishnan* v. *Sutton London Borough Council* [1970] Ch. 181 the Court of Appeal held that s. 1 (3) did not impose a mandatory duty on a local authority to return a child in care under s. 1 to its parents, but this was not a wardship case, and involved a "child" of nearly 18 who did not wish to return to her parent, and whom the court would not therefore have ordered to be delivered in habeas corpus proceedings; it does not thus affect the earlier decisions which proceed on the basis that there generally *is* such a duty *unless* the court intervenes, thus justifying the court's intervention in case the return to the parent be contrary to the interests of the child.

[23] See the 1969 Act *passim*. Note that this Act does nothing to implement the recommendations of the Seebohm Committee that there should be a regular statutory review of the exercise of the care jurisdiction: Report of the Committee on Local Authority and Allied Personal Social Services (Cmnd. 3703, 1968), paras. 190, 269. The right of parents or other persons to seek the discharge of a fit person order—1933 Act, s. 84 (6)—is repealed by the 1969 Act, under which only the local authority and the child can apply for a discharge: s. 21 (2). The 1948 Act remains in force alongside the 1969 Act, thus giving local authorities the option, in many cases, of proceeding under the judicial process of the 1969 Act or the administrative process of the 1948 Act.

[24] Which authorities are obliged to set up: 1948 Act, s. 39. For a useful account of the operation of these committees, see the inquiry carried out by Margaret Harrison and Alan Norton for the Committee on the Management of Local Government, *Local Government Administration in England and Wales*, Vol. 5, 1967, Chap. 12, "Some Aspects of the Children's Service." It would seem that there is often a feeling that the Children's Committee is a "'Cinderella,' ranking low in the committee hierarchy . . ." (para. 21), and, not surprisingly, some officials have a low opinion of the abilities of committee members: "One children's officer said that, apart from one member who was a trained social worker, committee members (who had an average age of over 65) tended to have a completely wrong outlook and no real comprehension of the sort of problems being handled. Another said the committee had never been known to produce a new idea or intelligent criticism . . . One officer went so far as to say that, with the exception of one member of considerable calibre, the committee were, 'in the main, people whom they can't fit in anywhere else'" (para. 9).

STEPHEN CRETNEY.

EXPULSION OF MEMBERS FROM A COMPANY

PRIOR to the 1969 election to the council of management of the National Association of Mental Health the names of a number of persons, who on reasonable grounds were believed to be Scientologists, including the plaintiff, were submitted as nominees. The incumbent management of the N.A.M.H., fearing that the Scientologists were making a bid to obtain control of the association, expelled from the association all those members who were " known or reasonably suspected of being Scientologists," among whose numbers was the plaintiff. The expulsions were justified as being a valid exercise of the power of expulsion vested in the council of management by clause 7 (B) of the articles of association of the N.A.M.H. This article provided that, " A member shall cease to be a member . . . (B) If he is requested by a resolution of the Council to resign [then followed provision for appeal.] "[1] Not unnaturally those expelled contested their expulsion.[2]

Their first argument was that clause 7 (B) was void in that as its equivalent was not to be found in Table C[3] of the Companies Act 1948, its inclusion in the articles of the N.A.M.H. violated section 11 of the Companies Act. Megarry J. rejected this argument. The model articles and memorandum, the learned judge reasoned, were intended to provide "models and not strait jackets," and provided the draftsman follows the "general form of the relevant table, setting out matters in numbered paragraphs and dividing the subject-matter between the memorandum and articles in the manner suggested by the table" he is then free "to add, subtract or vary as the needs of the case suggest."[4] Although this emasculates the regulatory effect of section 11, it merely puts the imprimatur of judicial approval on a position already achieved by the corporate draftsman[5] and which has been impliedly accepted by the courts in prior cases.[6] In *Cotman* v. *Brougham*[7] there is a suggestion by Lord Wrenbury that the registrar would be justified in refusing to register a company with overly verbose "memoranda of association which . . . contain paragraph after paragraph not specifying or delimiting the proposed trade or purpose."[8] The more elaborately reasoned judgment of Megarry J. in *Gaiman* v. *N.A.M.H.* indicates, however, that such a discretion does not inhere in the registrar.

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[1] The plaintiffs unsuccessfully argued that the expelled member did not cease to be a member until he had exhausted his right of appeal and the decision to expel him had been confirmed: see [1970] 2 All E.R. 362, 372–378.

[2] No objection was raised to the standing of the plaintiffs to commence the action. Basically the orders sought by the plaintiffs were injunctions preventing the association from treating them otherwise as members: see [1970] 2 All E.R. at p. 370.

[3] This sets out the model form of memorandum and articles suitable for a company limited by guarantee and not having a share capital. The N.A.M.H. was incorporated in this form.

The second point raised by the plaintiffs was that the "council had acted in breach of its fiduciary duty of acting for the benefit of the association as a whole."[9] This ground of complaint involved two separate issues: (a) that the directors when exercising their power had only considered the interests of the non-Scientologist members of the N.A.M.H. and, (b) even had the directors acted bona fide in the best interests of the association, in expelling the plaintiffs they used the power to expel for an improper purpose. With respect to (a), Megarry J. adopted the definition of "interests of the company" put forward by Lord Evershed in *Greenhalgh* v. *Arderne Cinemas Ltd.*[10] It is unclear, however, the extent to which the doctrine in that case and its pedigree,[11] dealing with the permissible scope of the alteration of the terms of the contract between a company and its members, apply in regulating the exercise of a power already vested in the directors by the articles.[12] With respect to the latter situation the test is couched in a more subjective terminology, the directors must act "bona fide in what they consider—not what the court may consider—is in the interests of the company." [13] Provided this test of subjective good faith is satisfied it would be permissible for the directors to discriminate between the Scientologist and non-Scientologist members of the company in exercising any of their powers, something which Lord Evershed considered in *Greenhalgh* v. *Arderne Cinemas Ltd.* would vitiate an alteration to the articles.[14] However, even if there is a difference in these tests they would both appear to have been satisfied in *Gaiman* v. *N.A.M.H.* It would have been quite permissible, for example, for the association to have altered its articles to vest in the directors the power to expel the Scientologist members.[15]

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[4] [1970] 2 All E.R. at p. 371 G–J.

[5] Megarry J. recognised that while the "views of a draftsman of precedents, however eminent, cannot of course override the provisions of a statute" the court was "entitled to pay some regard to a book of precedents of high repute which must have provided a foundation for a very large number of sets of articles." The book of precedents referred to was *Palmer's Company Precedents* which has enjoyed a considerable "legislative" influence recently: see *Bushell* v. *Faith* [1969] 1 All E.R. 1002; affirmed [1970] 1 All E.R. 53.

[6] See, *e.g.*, *Bell Houses Ltd.* v. *City Wall Properties Ltd.* [1966] 2 Q.B. 656; *Cotman* v. *Brougham* [1918] A.C. 514. In these cases the courts invoked s. 15 of the Companies Act 1948 (or its equivalent in past Acts) to preclude their investigation into the validity of a particular set of memorandum or articles. Megarry J. did not rely on s. 15 in *Gaiman* v. *N.A.M.H.* as it could not "cure any failure to comply with a statutory requirement as to substance." But the reason why the present wording of s. 15 was adopted by the Companies Act 1900 (s. 1 added the words "matters precedent and incidental thereto") was in order to conclusively deal with the situation where the memorandum had been signed by insufficient members, which can be categorised as a "matter of substance." It is respectfully submitted that the only situation where the registrar's certificate is not conclusive is where a trade union has acquired corporate status: see Companies Act 1948, s. 459 (9) (*d*): *cf.* Hickling, "Trade Unions in Disguise" (1964) 27 M.L.R. 625.

[7] [1918] A.C. 514, 523.

[8] *Ibid.*

[9] [1970] 2 All E.R. at pp. 370–371.

[10] [1951] Ch. 286, 291.

The plaintiffs' point (b) involved the allegation that the power to expel had been used for an improper purpose, namely, to maintain control in the hands of the existing council of management of the association. In determining whether or not a power has been used for an improper purpose it is necessary to determine from the terms in which the power was granted by the articles the purpose for which it was conferred. Occasionally, however, this can prove difficult as a power can be conferred for more than one purpose. For example, it is now clear that a power to allot shares is not vested in the board exclusively for the purpose of raising capital. It can also be used to guarantee that the number of shareholders does not fall below the statutory minimum,[16] or for the fostering of desirable business connections with other companies.[17] What is abundantly clear is that a power to allot shares cannot be used by the directors to perpetuate or to consolidate their control.[18] Even to this principle, however, the *caveat* must be added that if the directors use their power for a proper purpose the mere fact that it indirectly furthers their interests as directors, and they fully appreciate this at the time they exercise the power, the particular exercise is not impeachable.[19]

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[11] Pennington, *Company Law* (3rd ed.), at pp. 70–76.

[12] On this generally see Gower, *Company Law* (3rd ed.), at pp. 570–578.

[13] *Re Smith & Fawcett Ltd.* [1942] Ch. 304, 306 *per* Lord Greene M.R. In the only case dealing with the expulsion of a member from a company where the articles contained a power of expulsion which was vested in the shareholders there is a dictum to the effect that even if the shareholders had acted mala fide in effecting the expulsions, their decision would not be impeachable: see *Phillips* v. *Manufacturers' Securities Ltd.* (1917) 116 L.T. 290, 297.

[14] [1951] Ch. 286, 291. See also *Australian Fixed Trusts Property Ltd.* v. *Clyde Industries Ltd.* [1959] S.R. (N.S.W.) 33.

[15] Such an alteration would appear to be covered by *Sidebottom* v. *Kershaw, Leese & Co. Ltd.* [1920] 1 Ch. 154. Admittedly provision was made in that case for compensation, but compensation has little role to play in the case of companies limited by guarantee and not having a share capital.

[16] *Punt* v. *Symons* [1903] 2 Ch. 506, 516.

[17] *Harlowe's Nominees Pty. Ltd.* v. *Woodside (Lakes Entrance) Oil Co. Ltd.* (1968) 42 A.L.J.R. 123.

[18] *Fraser* v. *Whalley* (1864) 2 Hem. & M. 10; *Piercy* v. *S. Mills & Co.* [1910] 1 Ch. 77; *Ansett* v. *Butler Air Transport Ltd.* (1958) 78 W.N. (N.S.W.) 299; *Hogg* v. *Cramphorn Ltd.* [1966] 3 All E.R. 420.

But it is not with respect to the exercise of all powers that the directors must remove from their consideration the effect of such exercise on control within the company. For example, in determining whether or not to register a transfer the directors can take into consideration the fact that the "transferee would obtain too great a weight in the councils of the company, or perhaps obtain control."[20] It has been suggested that it is difficult to appreciate "why the director enjoyed a freedom of action in *Re Smith & Fawcett Ltd.* in regard to approving a share transfer which he was denied in *Piercy* v. *Mills* in regard to a share issue."[21] The explanation for this difference is surely attributable, however, to the courts' interpretation of the terms on which the powers were vested in the board of directors in the respective cases. Whether or not one considers their interpretation reasonable, in particular that in *Re Smith & Fawcett Ltd.*, these cases highlight the nature of the proper purposes doctrine.[22] The doctrine has no independent existence outside the articles of association. Accordingly, it would be quite permissible for the draftsman to frame the articles so as to eliminate the application of cases dealing with the proper purposes doctrine. For example, an article permitting the directors to exercise their power to allot shares to maintain themselves in control, provided they thought that this was in the best interests of the company, would seem to be unimpeachable.[23]

In *Gaiman* v. *N.A.M.H.*, Megarry J. did not consider that the power to expel had been exercised for a purpose that was "ulterior": the power was "A direct power to deprive a member of his membership; it [was] not a power to reduce capital (if that could be good) [24] which [was] being used with the ulterior purpose of depriving a member of his membership." [25] Although the exercise of the power of expulsion in *Gaiman* v. *N.A.M.H.* had the collateral result that the incumbent council of management remained in control, the primary purpose in expelling the Scientologists was to remove those members whose continued membership could damage the long-term interests of the association. On proper analysis, the situation in *Gaiman* v. *N.A.M.H.* falls into the *Mills* v. *Mills* category of cases. However, it does impliedly support the thesis that the proper purposes doctrine does not exist outside the articles of association. If, as the case holds, it is proper to confer on the directors power to "decimate the opposition," [26] there would appear to be no objection to vesting in the directors power to provide themselves with "reinforcements," thus maintaining themselves in control.

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[19] *Hirsche* v. *Sims* (1894) A.C. 654; *Mills* v. *Mills* (1938) 60 C.L.R. 150; *Harlowe's Nominees Pty. Ltd.* v. *Woodside (Lake Entrance) Oil Co.* (1968), 42 A.L.J.R. 123. This last case contains a neat statement of the principle. An allotment is voidable if the directors had an "actual purpose of thereby creating an advantage for themselves otherwise than as members of the general body of shareholders" (at p. 125).

[20] *Re Smith & Fawcett Ltd.* [1942] 1 Ch. 304, 306. Even with respect to the allotment of shares it might be quite proper for the directors to prefer one faction over another: see *Spooner* v. *Spooner Oil Ltd.* [1936] 2 D.L.R. 634. This, of course, is what happened in the British Aluminium Affair: see Stamp and Marley, *Accounting Principles and the City Code* (1970), at pp. 6–7.

[21] Parsons, "The Directors Duty of Good Faith" (1967), 5 Univ. of Melb.L. Rev. 395, 422.

[22] One other way of distinguishing the cases is that the transfer cases are concerned with some party, other than the directors, acquiring control, while the allotment cases are concerned with the acquisition or retention of control by the directors.

[23] Such a provision would not run afoul of s. 205 of the Companies Act 1948 as it does not exempt the directors from compliance with their fiduciary duties. It would be politic to restrict such a provision to cases where the control of the incumbent management is threatened by a take-over, otherwise it might infringe s. 184 of the Companies Act 1948.

The last point raised by the plaintiffs, which had a certain novelty to it, was that the association had failed to comply with the rules of natural justice when expelling them. From cases dealing with companies limited by shares [27] it can be readily inferred that the principles of natural justice do not apply to such companies. Megarry J. was unwilling to extend their application to companies limited by guarantee.[28] On the whole this is a satisfactory conclusion, and seems to be a natural result of the contractual foundation on which shareholders' rights are based. If the courts were determined to protect shareholders from oppression they could do so without invoking the principles of natural justice.[29]

It cannot be claimed that *Gaiman* v. *N.A.M.H.* is a case of revolutionary importance, if such a claim can be made for any case. For those who like certainty it clarifies the position with respect to section 11 of the Companies Act 1948. The major interest of the case is that it throws some interesting side-lights on the proper purposes doctrine. Also, all those unincorporated, non-profit-making associations which have difficulty in treating their members fairly can now attempt to relieve themselves of this burden by carrying on their affairs in corporate form.

D. D. PRENTICE.

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[24] Perhaps a better example would be that of redeemable preferred shares where the board have a discretion as to the date of redemption.

[25] [1970] 2 All E.R. at p. 873.

[26] *Ibid.*, at p. 873 G.

[27] Primarily cases dealing with restrictions or the right to transfer shares, *e.g.*, *Re Gresham Life Assurance Society, ex p. Penney* (1872) 8 Ch.App. 446, and cases dealing with pre-emptive rights, *e.g.*, *Borland's Trustee* v. *Steel Bros. & Co. Ltd.* [1901] 1 Ch. 279; *Hunter* v. *Hunter* [1936] A.C. 222.

[28] Megarry J. also relied on the fact that the interests of the association might require that some members be expelled immediately, and that the plaintiffs "liberty, property or means of livelihood" were not at stake.

[29] For an extension of common law doctrines to protect shareholders against majority oppression see the judgment of Traynor, J. in *Jones* v. *H. F. Ahamson & Co.* (1969) 40 P. 2d 464.

REVIEWS

THE COURTS AND CRIMINAL PUNISHMENTS. By SIR JOHN VINCENT BARRY. [New Zealand THE GOVERNMENT PRINTER, WELLINGTON, NEW ZEALAND. 1969. 91 pp. $1.50 (N.Z.)]

SHORTLY before his death on November 8, 1969, Sir John Barry, judge of the Supreme Court of Victoria, Australia, prepared these three lectures for delivery in New Zealand. His illness prevented them from being given, but they have now been published with a Foreword from Dr. J. L. Robson, New Zealand's indefatigable Secretary for Justice. The three lectures discuss (1) The Courts and Criminal Punishments, (2) Judicial Sentencing or Treatment Tribunals? (3) The Abatement of Imprisonment. They represent a most valuable postscript to a most distinguished career, for Judge Barry was not only a first-class judge but also an author of the standard work on Alexander Maconochie of Norfolk Island, chairman of the State of Victoria's parole board since its inception in 1958, and a well-known international figure in the field of criminology.

These ninety pages contain much practical wisdom on a variety of topics. While Judge Barry's views about the reality of the drive for retributive punishment will not be acceptable to those criminologists who deny its validity, there is much to be said for his view, at least as a starting-point for a useful discussion, though we might not wish to go the whole way with his argument. While one may be inclined to get bored with all the writing and public discussion concerning the philosophy of punishment in recent years, one is bound to admit with Judge Barry that "Theories of punishment are, after all, philosophical attempts to find rational moral justifications for what we in fact do with criminal wrongdoers, and for the proper limitations that should be observed in the way we deal with them." Judge Barry admires the unemotional pragmatic approach towards sentencing which is practiced in British communities, but he thinks that courts have a duty to speak out and act to protect society against violence. He asserts vigorously that "it is bad science and worse sociology to disregard social realities and the actualities of the criminal process, and that the improvement of the criminal law and its inseparable adjunct, the punitive process, is not likely to be achieved if we delude ourselves about their essential characteristics and the factors that bring them about."

The second lecture concerns itself with an examination of the alternatives to judicial sentencing. Here we have in a convenient compass an excellent survey of the alternative schemes for replacing judges as sentencers. Treatment tribunals were first suggested, it seems, in 1925 by Professor Sheldon Glueck. Since then other scholars, including Dr. Hermann Mannheim, Professor R. L. Jackson and Dr. Nigel Walker, have put forward similar ideas. Judge Barry offers several detailed criticisms of such schemes. The main fallacy is the belief that a board of experts would be any more scientific than the courts. At the very least similar considerations would have to be weighed, as the California Adult Authority and the parole boards show. There might be more room for disparity of sentences if several boards were operating than under the present system of sentencing by judges subject to review on appeal. The dangers of entrusting such vast powers to an administrative body meeting in private are stressed. "The tribunal would not be bound to hear witnesses on behalf of the offender, nor to give reasons for its decisions."

A preferable solution in the judge's view, lies in helping judges to reach better decisions by furnishing them with the information and advice they need, and with training in this part of their duties. He also has great faith in the potential of the parole system, "because it goes some distance towards satisfying the views of critics who contend that the sentencing process should properly be regarded as an administrative matter. . . . It is by such methods . . . rather than by the abandonment of traditional social institutions . . . that advances should be made in the correctional system." While he is somewhat critical of the parole system introduced in the United Kingdom by the Criminal Justice Act 1967, which he regards as "unduly cautious and cumbersome, and likely to function badly because of its complexity," there is no doubt in his mind about the direction of future developments. This includes the segregation indefinitely of the dangerous offender and doing our utmost to rehabilitate the rest. This latter task requires the constructive participation of the community as a whole, and it is in enlisting the support of the whole community that the hope for the future lies.

The third lecture, entitled "The Abatement of Imprisonment," describes briefly the history of imprisonment in western society, tracing its emergence as "virtually the only drastic method of criminal punishment" with the decline of physical penalties and the ending of transportation. There follows an outline of the competing schools of thought about prison management in the nineteenth century (the separate and the silent schools). Of these the author declares: "The fundamental flaw was the belief that reformation and rehabilitation can be achieved by coercion." The modern view, so clearly expressed in England in the Gladstone Comittee's Report of 1895, is that prison is not to be regarded as a place where prisoners are degraded and repressed but as a place where an opportunity is afforded to bring constructive and positive influences to bear on the prisoner. There is agreement about the objectives among modern prison administrators.

One interesting suggestion considered by Judge Barry is for a form of judicial supervision of the prison administration similar to that which has already been introduced in several Latin countries, in order to safeguard the basic rights of prisoners. This has been advocated by Professor Helen Silving, but Judge Barry dismisses it as "highly likely to introduce confusion and instability into a penal system" and "a strange medley of judicial and administrative concepts." Instead he believes that "basically what is needed to transform a penal system is a constructive and realistic attitude of mind in administrators, and in the public as well, and a sufficiency of money." The latter is the more difficult of these requirements to attain.

This little book is a rare gem and a fitting epitaph to a kindly, humane and most knowledgeable student of penal affairs. As such it deserves a wide readership among those interested in penal problems.

J. E. HALL WILLIAMS.

THE FORMATION AND ANNULMENT OF MARRIAGE. By JOSEPH JACKSON, M.A., LL.B.(Cantab.), LL.M.(Lond.), of the Middle and Inner Temple, One of Her Majesty's Counsel, and of the South Eastern Circuit. Second edition. [London: Butterworths. 1969. 468 pp. inc. index. £4 16s. or £4.80.]

"THIS is really a book about people, their splendid foibles and their remarkable ingenuities" (p. vii).

Joseph Jackson is an eminent family law practitioner and also, judging by this book, a considerable legal scholar. From the extremely wide range of material it is evident that this work has gradually matured in the library of a patient researcher.

The contents are as follows: historical background; the categories and concepts of annulment; marriage, restrictions and capacity; formalities of marriage; consents required by law to marriage; the non-consummated marriage; bars to relief; specific jurisdiction; and the residuary bases of jurisdiction.

Although admittedly they appear to cause little trouble in practice, the rules of English law regarding capacity and formalities represent a complicated muddle. Can it be seriously contended that the following features are satisfactory in contemporary times? 1. The minimum age for marriage is sixteen. 2. Parental consent is not required after eighteen. 3. Parental consent is not too difficult to forge (although the Family Law Reform Act 1969, s. 2 (3), has sensibly given greater power to the Superintendent Registrar). 4. Absence of parental consent where required does not render a marriage void. 5. Only one clear day's notice of marriage need be given. 6. The residence requirements are very slight. 7. Banns are very easily complied with. 8. The witnesses to the marriage can be strangers. 9. Due to the regrettable absence of identity cards protection against the bigamist is very slight. 10. No medical examination is necessary. 11. No marriage advice is necessary (*cf.* the reconciliation provisions in the Divorce Reform Act 1969). 12. There are both religious and civil marriages. 13. The Church of England has certain privileges not accorded to other denominations. The need for a new modern and responsible civil marriage code seems very strong. The starting point for the study is to be found here in Joseph Jackson. Incidentally, an interesting feature of some jurisdictions is that the judge is given power to dispense with the requirements of affinity and consanguinity (p. 158).

Since the text left the hands of the author the Marriage (Registrar General's Licence) Act 1970 has now made provision for death-bed marriages for non-Anglicans, readers will be pleased to know.

> "The requirement, if one may so state it, that the two persons should be two persons of different sexes would appear to be axiomatic. (The multiplication of authority for this proposition seems otiose.) If two persons of the same sex continue to go through a ceremony of marriage, the ceremony is not matrimonial at all: it is certainly not a void marriage, and matrimonial principles have no application to such a 'union'; but the participants in the ceremony almost certainly will commit a criminal offence of giving false statements for the purpose of obtaining a marriage certificate" (p. 181).

Is the offence then one of strict liability? Joseph Jackson appears to agree with Ormrod J. in *Corbett* v. *Corbett* [1970] 2 W.L.R. 1306; [1970] 2 All E.R. 878 that every person is born with a basic biological chromosomatic sex which is unalterable for life (p. 306). As he says in his preface: "And there is the ultimate question in a sense, what is a man and what is a woman?"

Conflict of law problems are most carefully and fully considered at every stage of the work and probably represent the most notable part of the work. To embark on an analysis of *Ross-Smith* is a formidable undertaking and one discharged with success. He appears to approve the view of Sir Jocelyn Simon P. in *Padolecchia* v. *Padolecchia* [1968] P. 314 that *Simonin* v. *Mallac* was affirmed by the House of Lords in respect of a void marriage.

Certain criticisms must be made of the book. Reference to periodical literature, although in some places exceedingly full, tends to be a little patchy; short articles and case notes in M.L.R., L.Q.R. and I.C.L.Q. often give a most helpful insight into the significance of a case and should be given. The discussion of the case law is extremely competent, though there is a tendency to discuss a series of cases in sequence which leads to excessive attention to individual facts and insufficient attention to the principles underlying the cases; for example, what is the *ratio decidendi* and the significance of *Buckland* v. *Buckland* [1968] P. 296 (pp. 287–288)? There is a certain lack of the exercise of the critical faculty, which one might hope for in such a work. Finally, although the deficiencies of the law are exposed in a lucid and often witty manner positive proposals for improvement are not advanced.

ALEC SAMUELS.

TRADE UNIONS AND THE LAW. By ALEXANDER SZAKATS, DR.JUR., DR.POL. (Budapest), LL.B. (N.Z.) [Wellington: Sweet & Maxwell (N.Z.). 1968. xiii and 214 pp. (with index). 50s. net.)

DR. SZAKATS' book has a somewhat misleading title. It suggests to English ears a book about trade union law, but its subject matter is in fact far wider and is more accurately described as the law of collective labour relations in New Zealand. It provides a most interesting analysis of this as well as of the law governing internal union relations in that part of the common law world.

A weakness of the book, which may have resulted from the learned author's too narrow conception of the role of a labour lawyer, resides in its being largely confined to a description and analysis of the bare legal and procedural bones of the New Zealand system. One would have liked to have learned more about the economic and political context in which the New Zealand system of compulsory arbitration operates and some estimate made of its performance in terms of efficiency in the creation of wealth, equity in its distribution and the short and long term effectiveness of the way in which day to day disputes are handled in New Zealand industry. Given, however, a work force of something over 1 million in a homogeneous population, of which 360,000 or so are unionised among no less than 370 trade unions, the largest of which has only 35,000 members, the New Zealanders clearly have to grapple with problems enjoying simpler and clearer outlines than those which pound upon us in Britain.

It is plain from Dr. Szakats' discussion that doubts are beginning to be felt in New Zealand concerning the rigidity of the traditional system as well as its weighting in favour of employers and management; and discussion of some significance appears to have begun on the basis of the outstanding Report by N. S. Woods.

There are, however, aspects of New Zealand labour relations law from which we could draw valuable hints. In particular, mention may be made of the effective national minimum wage which the compulsory arbitration system has established as well as the institutional channel which that system creates for bringing to bear upon wage determination the public interest in economic stability, especially the interest of those on fixed incomes.

Also, the New Zealanders have created a device which we might adopt, perhaps with one slight modification, in order to reconcile the continuing legality of the closed shop in this country with the need to secure an individual's independence, a need still felt in a country like Britain which continues to enjoy a humane civilisation. This device is the statutory right of any employee under a closed shop régime in New Zealand to apply to the Registrar of Industrial Unions for a certificate of exemption from union membership covering the occupation in which he is employed on the ground of "conscientious belief," a concept which is not restricted to religious grounds only but "embraces any kind of genuine and sincere objection to being a union member" (p. 166). Applications for a certificate of exemption are heard by the Conscientious Objection Committee which is apparently a tripartite body. If the Committee, after hearing the submissions and evidence, is satisfied that the applicant's objections are genuine, it will notify the Registrar and the secretary of the union in question of its decision and will issue to the applicant a certificate of exemption from membership of the union for the period specified in the certificate. The applicant receives his certificate on condition that he pays to the credit of the Social Security Fund an amount equal to the union subscription. If we were to adopt some such admirable principle and procedure in this country, I would suggest that the conscientious objector be required as a continuing condition of his exemption from union membership to make regular payment of the union's general subscription to the union itself, since the conscientious objection is never to the benefits which the activities of the union help to confer upon employees but only to the obligations of membership including, possibly, the imposition upon a member of strike action, or picketing duties, or the ostracism of a fellow employee any or all of which may be abhorrent to a particular individual's conscience.

One looks forward to future editions of Dr. Szakats' work when he will be able to give his considered opinion of what effect the Woods Report has had upon the New Zealand labour relations scene.

CYRIL GRUNFELD.

THE LAW RELATING TO THE CONTROL OF COMPETITION, RESTRICTIVE TRADE PRACTICES AND MONOPOLIES IN NEW ZEALAND. By JOHN COLLINGE. Wellington: Sweet & Maxwell (N.Z.) Ltd. 1969. 444 pp. (inc. index). In New Zealand $12.50 and in the U.K. £6 5s. 0d.]

THIS is an important book—the first substantial work on the New Zealand law controlling restrictive trade practices and monopolies. It contains a lucid, concise and surprisingly full description and analysis of the statute and case law, not only the laws relating to the practices whose effect on the public interest can be examined by the Restrictive Practices Tribunal, but also the many statutes under which it is an offence to engage in certain practices, such as the Control of Prices Act 1910 which forbids profiteering, black marketing and hoarding; as well as the common law offences.

Those concerned with the United Kingdom law may find much to interest them. Whether it is better to adopt an adversary or inquisitorial procedure when deciding whether restrictive practices operate the public interest remains controversial, and Mr. Collinge devotes some pages not only to this matter in general, but also to the procedure of the New Zealand Tribunal. The New Zealand Trade Practices Act 1958 has to some extent been modelled on our Restrictive Trade Practices Act, though there are significant differences. The list of agreements and practices subject to examination in that country is far longer than ours, but its coverage is more limited. When it considers the public interest, the Tribunal can condemn an agreement or practice only in limited circumstances, and any defence is relevant—so that in practice the Tribunal has been far more lenient than our Restrictive Practices Court. Moreover, since 1961 registration has no longer been required, so far more restrictive practices may be expected to prevail openly in that small country than in ours. A further difference from our law which may have saved considerable time and costs is the requirement in New Zealand that the Examiner should negotiate with the parties in an attempt to persuade them to bring their practices to an end, or to modify them, before he refers them to the Tribunal. Our Registrar has no such power, though the reference, or the formal steps leading up to one may persuade the parties to abrogate their agreement rather than face the expense, trouble and publicity of a hearing lasting several weeks. Since the decisions of the Trade Practices and Prices Commission and of the Trade Practices Appeal Authority may not be readily available outside New Zealand, the eighty page appendix containing a compendium of cases is a particularly valuable feature of this work. Large sections of the judgments are set out verbatim although the author's criticisms are contained in the main part of the work. The three most important statutes are also set out in another appendix.

The author also analyses the common law doctrine of restraint of trade in the light of the English *Esso* case, and the torts of conspiracy, intimidation, etc. This is done at some length and thoughtfully by the author who is clearly familiar with recent developments in this country as well as in New Zealand—indeed the authorities analysed in this chapter are mainly English.

The book concludes with an assessment of the New Zealand law, contained in numerous statutes; of the illegality of some boycotts and the mere liability to examination of others which seem no less reprehensible; of the narrow scope of some of the statutes. The author's complaint is not that the law forbids some practices *per se*, while providing for the scrutiny of others to see whether they are contrary to the public interest—some being presumed to be bad, and others good: he criticises rather the haphazard way in which similar practices are treated differently. For instance the Monopoly Prevention Act forbids persistent pricing below cost only for agricultural implements, but the practice may be equally anti-social in other markets. Some boycotts are made illegal by the Commercial Trusts Act and others, which seem no less harmful to the public, are only subject to scrutiny under the Trade Practices Act; while the imposition of resale prices by wholesalers, but not their imposition by retailers, can be referred to the Tribunal.

This is a scholarly, lucid and critical analysis of the New Zealand law. It should make it possible now to teach the subject at university and will be a great help to those concerned with advising businessmen as well as those interested in law reform.

VALENTINE KORAH.

GILBART LECTURES ON BANKING 1970. THE BUSINESS OF BANKING (PRACTICAL ASPECTS OF THE LEGAL DEFINITION). By F. R. RYDER, LL.B., F.I.B. [King's College, London: 1970. 7s.]

As a former Gilbart Lecturer I welcome Mr. F. R. Ryder to their small company. He is a senior member of the legal staff of the Midland Bank and well known as a contributor to banking periodicals on subjects of legal interest to bankers.

He has taken as the subject for his first series of Gilbart Lectures a group of problems connected with the meaning of the term "banker" which are in a sense basic to the whole subject of the law of banking, though too specialised for detailed discussion in a notice in this *Review*.

Mr. Ryder's treatment of his theme is of a highly practical character—indeed the word practical not only appears in the title to the course, but will also frequently be found in the lectures themselves which must have commended itself to his audience which consists for the most part of young bank officers. This does not mean that the lecturer's firm grasp of principle is not refreshingly evident. Also there is a welcome absence of dogmatism, which is well, as occasionally his views are open to argument. In the result he has produced what could be regarded as an introduction to the law of banking of a stimulating and not too detailed a character which one may well hope is a prelude to a number of further series of Gilbart Lectures.

C.

INTERNATIONAL LAW. By D. W. GREIG. [London: Butterworths. 1970. xx and 728 pp. £8 18s. 0d. net.]

THE appearance of a new major treatise on international law is a rare event. The writer, who formerly taught the subject in England, was Senior Lecturer in Law at Monash University in Australia and is now Professor of Law at the University of Wales Institute of Science and Technology. In his Preface, Professor Greig tells us that he has attempted to survey both the general law of peace and the law of international institutions within the same framework; to do this without relying quite so exclusively on Anglo-American material as English-speaking writers have tended to do in the past; and to produce a work that is fundamentally a lawyer's book "aimed primarily at students taking final year courses as part of their degree, or studying general aspects of international law as part of an initial post-graduate degree, or diploma, by examination," but much of which "will also be suitable for students of international relations who take something more than a brief introductory course in international law as part of a politics degree." The author also explains that he has attempted to demonstrate "wherever appropriate that international law is only one aspect of the conduct of international relations."

As an examiner, the present reviewer can testify that this work seems already to have caught on with students taking degrees both in law and in international relations, and to that extent it can already be rated a success. No doubt the achievement of bringing out so large a work (in paperback) at a relatively attractive price is largely responsible for this, but in addition the author can fairly claim that he has written a book fit for the times. In circles where a wide rift has developed between the disciplines of international law and international relations, it may be objected that he has fallen between two schools, but there ought to be no doubt that fundamentally this is a book intended for law students rather than those concerned with the sociology of international politics.

The author's approach is conservative, not to say orthodox. He takes the reader along the familiar road of the Nature and Sources of International Law; the relation between International Law and Municipal Law; International Personality; Recognition; State Territory; Jurisdiction; Treaties; and International Claims. There then follow four chapters on International Organisations and a concluding chapter on the Use of Force by States. Subjects which receive no or only relatively little attention are the Laws of War and Neutrality; Nationality; State Succession; Outer Space; and International Economic Law, including such questions as most-favoured-nation clauses and such bodies as GATT. In pointing to these omissions it is not necessarily sought to criticise. The European Communities receive a modest amount of treatment but EFTA is only thought worth half a page and more attention might have been paid to the Council of Europe and the European Court of Human Rights.

The International Court of Justice too seems rather uncomfortably placed at the tail-end of the chapters on International Claims. One would have thought that this tribunal merited a place under the heading of International Organisations—after all it is "the principal judicial organ of the United Nations" (Article 92 of the Charter). Moreover, having regard to the Court's advisory jurisdiction and its capacity to deliver declaratory judgments, its activity is not confined to "international claims." Quite apart from that, it would have been wise, in this reviewer's opinion, to bring the International Court more into the forefront of the book. One does not wish to exaggerate the role of judicial tribunals in international affairs. Nevertheless, as a teacher, I have found that if, as here, there is a reference on page 5 to Article 38 of the Statute of the International Court as the answer to the question of identifying the sources of international law, and if from page 7 onwards decisions of the Court are cited as authorities, it is rather disconcerting to law students not to learn about the place of the Court in the international system until they reach page 484. Much of the same applies to treaties. Quite properly the student is told of the importance of treaties from about page 7 onwards, but it is not until he reaches page 356 that he is actually told what treaties are and how they are concluded. These problems can of course be dealt with by the teacher, although in the case of treaties it is unfortunate that the exigencies of the publication date prevented the author from dealing satisfactorily with the Vienna Convention on the Law of Treaties 1969.

It has been felt right to call attention to those deficiencies, if they may be so called, because basically this is a very good book which law students will welcome. It would also be found useful by students of international relations.

D. H. N. JOHNSON.

THE UNITED NATIONS IN A CHANGING WORLD. By J. A. C. GUTTERIDGE, M.A. (Oxon). [Manchester University Press. 1970. 111 pp. (inc. appendices and index) 36s. (£1.80) net.]

CONSTITUTIONS grow old, they are difficult to amend, and as the years go by the problem becomes the definition of the acceptable limits of interpretation and de facto amendment. This has become particularly true of the Charter of the United Nations. Miss Joyce Gutteridge, a lady of great charm and a notable scholar who has spent a working life in the legal department of the Foreign Office, involving close connection with the work of the United Nations, brings her wisdom and experience to bear on the problem of the United Nations in a changing world in the latest volume in the excellent Manchester University Melland Schill lecture series. As one would expect, she rejects the static approach in favour of the evolutionary or dynamic approach. After considering the objects of the founders of the United Nations in 1945, and after recognising the virtual impossibility of any formal or constitutional amendment, Miss Gutteridge spells out the following wholly acceptable conclusion:

> "It is submitted that the test of the legal validity of any new development, and of any action by the Organisation or one of its organs which is not specifically provided for in the charter, is a double one: the action or development must not be precluded by any express provisions of the charter, and it must be action which is necessary to carry out the Purposes of the Organisation as these are set out in article 1 of the charter."

On this test the Uniting for Peace Resolution is legally valid; and the failure of the Security Council to discharge its responsibilities on behalf of all Member States does not relieve those states of their obligations to maintain international peace and security. But despite their success the peace-keeping operations of the 1950s and 1960s are unlikely to be repeated, as Vietnam has shown, and Miss Gutteridge is unfortunately probably too optimistic in pointing even cautiously to the possibility of a recreated United Nations force to be stationed in a demilitarised zone between Israel and the United Arab Republic.

In the good old colonial days of 1945 self determination was a good slogan and was readily understood and applied. But now that the colonial days are over some colonies, *e.g.* Gibraltar and Falkland Islands, actually do not seem to want self determination and the concept of self determination has been taken up by seccessionists from non-colonial powers and the concept has not been found to be so universally acceptable. The Anguilla situation could hardly have been foreseen in 1945. Miss Gutteridge cannot shake off a lifetime of diplomacy, and cautiously concludes that the Anguillan situation at least illustrates the difficulty of attempting to apply uniform solutions to former colonial territories.

Finally Miss Gutteridge turns to recent developments in the field of economic co-operation, especially UNCTAD, UNIDO and UNICITRAL. Unfortunately here the East-West division and colonialism have not inhibited a large measure of successful co-operation and the legal problems of constitutionality have not been so severe. Given genuine international co-operation it is surprising, or perhaps not so surprising, how rapidly the legal problems can be resolved.

In these lectures, well documented and supported by the text of the main resolutions in appendices, Miss Gutteridge admirably displays her mastery of the subject, her experience, her cautious diplomatic and practical sense, coupled with her real insight and vision.

ALEC SAMUELS.

MICROSTATES AND MICRONESIA. By STANLEY DE SMITH. [New York and London University Press. 198 pp. $U.S. 7.50.]

DE SMITH has a delightful style and a Voltairean sense of irony; for example (at p. 112) concerning the Chamorros of Guam—

> "Native uprisings impeded the diffusion of the word of God. Military pacification restored the situation, and by the early eighteenth century spiritual enlightenment had been spread; but it is estimated that the Chamorro population . . . had been reduced to barely one-twentieth of its former size . . . The Chamorros have remained good Catholics ever since."

His latest work can be regarded as the notebook of a gifted constitutionalist who has been involved in making systems of government for new countries both continental and insular, and who used a study leave to take a look at the circumstances of a number of small island territories moving towards self-government or independence.

The result is a mélange of politics, geography, anthropology and law, and like most such leaves one unsatisfied, because many of the bits and pieces are so general or superficial. For example, on the economic and geographical side, he omits to deal with a cardinal question—the extent to which sea transport, still the cheapest form of mass transportation, may make up for the other handicaps of scattered small island aggregations. On the history of decolonisation, he has occasion to glance at Australia's attitude to New Guinea, and exaggerates the importance of U.N. pressure; the Menzies government was far more influenced by a sober consideration of the social and economic costs of absorbing the Territories into the Australian federation. He makes legitimate fun of the pompous absurdities committed by the U.N. Committee of Twenty-Four; for example (p. 69): "Members of the United Nations are on the whole, staunch supporters of the status quo, except when it comes to decolonisation." He does not, however, attempt to count the cost in human suffering of these follies.

It is fortunate indeed that, as he shows, a number of the small island territories have developed commendable scepticism about the claim that independence solves all problems, and an unwillingness to poke their noses into the business of the whole world which infuriates their would-be mentors in Africa and Asia.

On the constitutional matters which are the particular special skill of the author, there is much learning lightly displayed. The sketch of the varying forms of American imperialism is particularly illuminating; it becomes clear why the British were both better overlords and better at disengaging from their imperialisms. De Smith shows how in many cases the ex-colonials start off with the pattern of government of the former colonial power, notwithstanding warnings that this might not suit them at all, because it becomes a matter of ex-colonial pride to prove that they can work such a system as well as the former masters. He may not, however, show sufficient awareness of the rate at which such territories have begun to wake up to the dangers of these procedures. Thus he does not mention at all the imaginative effort of the British Solomon Islands to break away from Westminster in the direction of a committee system better suited to a small territory, and owing much more to the London County Council than to the Mother of Parliaments. Similarly in Papua-New Guinea, an indigenous development of the past five years has produced a situation nearer to Switzerland (as to the relation of parliament and executive) than to Canberra. It is likely enough that American Micronesia will take note of such things, in spite of the lunatic insistence of Washington on its pet panaceas—especially since Jim Davidson, the Solon of Samoa, the Cook Islands and Nauru, is now a constitutional adviser to the Micronesian indigenes. Incidentally, it would be interesting to know how the Committee of Twenty-Four managed to approve the Nauruan settlement, which has turned the Nauruans under Hammer de Roburt into one of the most perfect of exploiting colonialist aristocracies, living on the labour of imported Micronesians who are deprived of all political rights.

But the island territories tend in general to produce grotesque social combinations, as witness de Smith's entertaining account of the comic opera on Anguilla. Then there is the relation between mass abortion and the soft life on Yap.

One can well understand the spirit of constitutional tourism which impelled Professor de Smith to undertake this bitter-sweet voyage, and his book should be read by all who are concerned with the last stages of colonialism, but for my part I would now like to see the newly appointed Professor of Public Law at Cambridge—a richly deserved honour—returning to the less joyous but more rigorous task of interpreting the administration of his own country in its legal aspects.

GEOFFREY SAWER.

LAWASIA, being the Journal of the Law Association for Asia and the Western Pacific; Vol. I. No. 1. December 1969. The *Cambrian Law Review*, being the Journal of the Law Department of the University College of Wales; Vol. I. No. 1. 1970. *Kingston Law Review*, being the Journal of the Law Department of the Kingston Polytechnic Vol. II, Summer 1970.

I HAVE never before had the opportunity of welcoming so many new legal periodicals all at once. This does not mean that they were published contemporaneously: it is just that they arrived on the editorial desk more or less together.

To take them in the order of publication *Lawasia* should perhaps have a particularly cordial greeting as it marks the advent of what may become a significant movement in Asia and the Pacific. The Law Association for Asia and the Western Pacific was formed in 1966 from among the twenty-two countries represented on the Economic Commission for Asia which operates under United Nations auspices. The Australians who of recent years have come to realise their close ties with southern Asia evidently took the lead and *Lawasia* is at present edited and run from Sydney. This first number however makes it clear that there is considerable interest in the project extending from Iran through Indian and Malaysia, Indonesia, and Vietnam as far as Korea and the Philippines. That the Association is not merely academic appears not only in the pages of *Lawasia* itself, but from the fact that it has already sponsored a volume on Asian Contract Law, which is in fact reviewed in this issue of *Lawasia*, and has apparently stimulated a research project into research and security problems.

The present pattern for *Lawasia* seems to be a series of notes (rather than articles) on matters of topical interest in the area covered; among those likely to attract the English reader are the Proposals for the Abolition of Juries in Singapore, and First Steps towards a Family Court in New

Zealand. Among the more substantial items, and of considerable interest, are articles on the Settlement of Disputes arising from International Trade and Investment and on a project for a Law Centre in the University of the Philippines on lines originally suggested by the late Chief Justice Vanderbilt of New Jersey.

Proposals for starting a law review have long been mooted in the University College of Wales, and the lengthy period of gestation has certainly produced a fine child in this first issue. Under the Presidency of Lord Justice Edmund Davies, who contributes an interesting survey of present legal trends, under the title of "Ferment in the Law," a strong team of authors has been gathered together. Sir David Hughes Parry in a delightful tribute to Professor Llewelfryn Davies, who is about to retire, gives us most interesting reminiscences of his work both in Aberystwyth and in London; and the Edwardian Reminiscences of Lord McNair and Professor H. A. Holland bring before us something of the personalities of such giants in the legal teaching world as Buckland and Kenny, as well as providing thumbnail portraits of others only less eminent. Other contributors include Professor C. A. W. Manning, Mr. Montpensier, Professor Camps, the expert in forensic medicine, and Mr. Dafydd Jenkins whose witty and original essay on the Language of the Courts will be welcome to all those concerned with statutory drafting and construction, and indeed with legal drafting generally. His study of "the gradual deterioration" which has occurred in the drafting of the successive Industrial and Provident Societies Acts provides a fascinating and useful object lesson.

The Editorial Committee consists entirely of students with the addition of one staff member—curiously enough there is not one Welsh name among them! They explain that their object has been to produce a journal of general rather than of a technical legal nature. And indeed the articles are for the most part short; lacking the documentation so characteristic of the established learned periodicals.

The *Kingston Law Review* is the first law journal emanating from a polytechnic which I have had the pleasure of perusing. I did not see the first issues, but this, which appears to be the third, is well produced and full of interest. The articles which on the whole are short do not aspire to the quality of the learned periodicals, though that on the Problems of Secret Trusts by R. G. Kaye is perhaps an exception. Noteworthy is an article reprinted from *Lloyds Bank Review* on Nuisance: the Law and Economics, and Lord Gifford writes interestingly on a projected experiment in legal aid, which one hopes will come off, though it is not quite so original as he seems to think.

A number of short notes on current topics such as Blood Tests under the Family Law Reform Act 1969 will keep the student in touch with contemporary legal affairs.

CHORLEY.

FUNDAMENTAL PROBLEMS OF SOCIALIST CIVIL LAW. By GYULA EORSI. Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, Series in Foreign Languages, No. 6 Budapest: Akadémiai Kiadó. 1970. 185 pp. £2.]

YUGOSLAV CIVIL LAW: History, Family, Property. By A. G. CHLOROS. [Oxford at the Clarendon Press. 1970. xi and 285 pp. £8].

THE two books under review complete each other but both titles are a little misleading.

In his *Fundamental Problems* G. Eörsi does not discuss any "problems" in the true meaning of the word but presents mainly Hungarian Civil Law paying due regard to the legal systems of the Union of Soviet Socialist Republics and some East European countries—all essentially built up on the Soviet model—but excluding Yugoslavia. Since the famous breach with Stalin in 1948, Soviet attitude towards Yugoslavia has changed on several occasions. There were periods when the Yugoslav régime was attacked as "reactionary, revisionist, antisocialist," but there were also periods of the so-called "various roads to socialism" when the same régime was regarded as "progressive and socialist in character." The initial opposition of Yugoslavia to the invasion of Czechoslovakia by the U.S.S.R. and her allies in August 1968 caused a new wave of attacks on Yugoslavia and her economic and political structure. The Yugoslav concept of "social ownership"—howsoever confused and undefined it may be in Yugoslav theory itself—and the principle of workers' self-management, closely connected with this concept, were and still are strongly criticised as "contrary to the socialist planned economy," as "most dangerous for the achievement of socialism," as "leading to anarchy" and the like. Most probably this is the reason why G. Eörsi felt forced to exclude Yugoslavia from the civil law family of "socialist" European countries.

By mere coincidence A. G. Chloros' book was published in this country practically at the same time as that by G. Eörsi in Hungary, and it gives an excellent account of civil law precisely in the country which has been omitted in the *Fundamental Problems of Socialist Civil Law*. A. G. Chloros also pays adequate attention to the corresponding principles and rules in the legal systems of the Soviet Union and other East European countries. This is even more important than in Eörsi's book, because Yugoslav solutions very often radically differ from Soviet models. It can be only regretted that *Yugoslav Civil Law* does not contain at least one chapter on the law of obligations which forms an important and integral part of civil law not only in Yugoslavia but also elsewhere. On the other hand a large section (pages 43–181) is devoted to Yugoslav family law and the author advances his reasons for having included this matter into a book on Yugoslav civil law. His arguments can be accepted as reasonable, but it is necessary to bear in mind that in Yugoslavia, as well as in other countries which claim to derive the theoretical basis of their legal systems from Marxism, family law is not a part of civil law, but a separate branch of law, parallel with civil law, civil procedure, criminal law, criminal procedure and other legal branches, depending on the system in question.

Both authors are distinguished scholars. Gyula Eörsi is a well-known specialist in civil law and a Corresponding Member of the Hungarian Academy of Sciences. The present volume is an English translation of his original work published in Hungarian in 1965 under the same title but modified and completed in view of the economic reform introduced in January 1968. A. G. Chloros is now Professor of Comparative Law at King's College, University of London. The author spent several months in Yugoslavia during the Academic Year 1963–64 in order to study Yugoslav law, particularly in the Institute of Comparative Law in Belgrade, and its application in the judicial practice. His work is an outstanding achievement of conscientious research and scholarship.

G. Eörsi's *Fundamental Problems* consists of a preface and three substantial chapters subdivided into several sections. Chapter One discusses the social-economic foundations and basic notions of "socialist civil law" (with a very interesting section on "old" and "new" elements of civil law relations). Chapter Two deals with the legislative policy and the fundamental principles of "socialist civil law," including such topics as state influence and economic incentive as reflected in law, protection of subjective rights and protection of property, exercise of rights and abuse of rights (exercise of rights in conformity with their function). Chapter Three analyses the structure of civil law relations and some of the fundamental institutions of civil law: ownership, especially state ownership, and legal personality; state enterprises as subject at law; co-operative and personal ownership; contract and breach of contract; civil law liability and sanctions, etc. There is no index.

Professor Chloros' work is divided into a preface and four parts. Part One contains a concise but very good history of the legal systems which were in force in various lands of present-day Yugoslavia before 1918 and during the period between the two World Wars. There are also two maps—one of the S.F.R. Yugoslavia with the boundaries of the six republics and two autonomous provinces; the other of Yugoslavia in relation to the former Austria-Hungary—which will certainly help the reader to familiarise himself with this rather complicated legal history. Parts Two and Three relate to family law and the law of property (with special reference to the so-called "social property" which, as the author rightly points out, is "the most novel and controversial feature of the modern Yugoslav law of property"), respectively, whereas Part Four consists of an English translation of basic laws on marriage, relationship between parents and children, adoption and guardianship. An excellent index completes the volume.

Both books are well written, each in its own way. *Fundamental Problems* is a highly theoretical work with many abstractions and doctrinal discussions. It presupposes at least some knowledge of Hungarian law as formulated in statutes and applied in practice. Professor Chloros has a more pragmatic approach, although he certainly does not neglect the theoretical side. As he states in the Preface his "point of departure has inevitably been that of a common lawyer." In this respect he goes so far as to suggest that "the Common Law seems eminently fitted to explain 'social property' in Yugoslavia" (p. 115). Of course, no Yugoslav author or political leader would accept such an explanation, while some soviet writers could easily come to the idea of quoting this as "further evidence" of the "revisionist and anti-socialist character" of the Yugoslav economic system, but to an English reader it will perhaps make things more understandable.

The two books deserve attention of all concerned with Soviet affairs or interested in civil law, and, in general, in the legal structure of these countries. Those who are not familiar with these systems of law should, in the reviewer's opinion, read first Professor Chloros' book and then that by G. Eörsi.

Ivo Lapenna.

Processo e Ideologie. By Mauro Cappelletti. [Bologna: il Mulino. 1969. xi and 569 pp. 6,000 lire.]

It is now a commonplace that English law has analogies with classical Roman law in that they are both "action-oriented" systems, in the sense that lawyers in both systems think in terms of remedies rather than of rights. A consequence of this preoccupation with forms of action seems to have been a relative lack of interest in the theory of legal procedure, which has never been regarded in this country hitherto as a subject offering great jurisprudential potentialities. It is otherwise in the civil law systems of the continent, but especially in Italy proceduralists have tended to be legal philosophers (when they have not been politicians). Professor Cappelletti, who is known to English-speaking readers as co-author of *The Italian legal system* and *Civil procedure in Italy*, sees civil procedure (which for a continental lawyer is largely the law of evidence) as offering a screen on which the great legal themes of liberty and justice are projected with dramatic sharpness and clarity.

The present work is a collection of essays which he has published during the last decade, now grouped under three heads. In the first section, called "the ideological and social dimension," civil procedure is viewed as a reflection of the social, economic and political structures of society. The first essay deals with the admissibility of evidence and the extent to which the rules governing it are affected by ideological factors. At one level such an inquiry leads merely to the lessons, which we have learned from the American realist school, that even judges are men and their decisions may be affected by preconceived moral and social ideas. More interestingly, Cappelletti's study shows that countries with similar political ideologies tend to have basically similar laws of evidence, this tendency even transcending the historical differences between civil and common law systems, whereas countries with different political ideologies, even where they share a common historical basis for their laws, as do western and eastern European countries, have increasingly divergent approaches to evidence. The second essay illustrates this point by an investigation into the rights of the court to interrogate the parties, as understood in various communist systems. These systems impose on the parties a duty to bring before the court the whole of the fact-situation out of which their dispute arises and they empower the court, in the interests of the public as a whole, to go outside the parties' claims when making their awards.

This topic is taken up again in the sixth essay, which is a broad comparative survey of civil procedure in east and west. A common denominator of western systems is that they regard procedure as an instrument for giving effect to substantive law and they regard substantive law as a system of subjective rights, i.e. rights which may be asserted, transferred or renounced at the free disposition of the individuals to whom they belong. As a consequence of this attitude the judge is barred from initiating an action or counter-claim *ex officio*, and indeed from taking any steps which are *ultra petita partium*. Communist systems, on the other hand, do not accept that the civil law is a private law, concerned to protect the interests of individuals, and so their whole approach to such questions as admissibility of evidence and the principle of orality is bound to be different. Nevertheless, Cappelletti notes a general movement by the two groups of systems towards a common ground. Western systems have undergone a process of socialisation, which is exemplified in the tendency to make the proclaimed equality of the parties before the court more effective in practice, by providing for the situation in which one party can afford to pay for legal representation and the other cannot. Another example of the same process is the revival of the duty, imposed on the parties, not to allege facts which they do not believe to be true. The old Romano-canonical procedure enforced this duty by the oath of calumny, which incidentally is still found in Scots law. Within the Western bloc the civil and common laws of evidence have moved closer together, with the parallel dismantling of the elaborate, scholastic rules of legal proof, which were a feature of the former, and of the system of exclusionary rules which characterised the latter.

The second group of essays is concerned with the international aspects of civil procedure, and includes a plea that legal studies in Italian universities should take greater account of the growth of supranational organisations and of the development of international institutions for settling disputes. There is also a history, sketched in broad strokes, of Italian civil procedure from Roman times to the present day, but this is more readily available in Cappelletti and Perillo's *Civil Procedure in Italy*. Most of the section is devoted to discussions of the treatment of foreign decisions by the Italian courts and the general attitude of Italian law to foreign law, both as it is and as it, in the author's view, ought to be.

The last group of essays, devoted to "the constitutional dimension" of procedure, is both the shortest and the least lacking in coherence of the three. The most substantial essay, on "The significance of judicial review of legislation in the contemporary world," is available in English in *Ius privatum gentium: Festschrift Max Rheinstein, 1969*. There is also a note discussing the implications of the House of Lords' decision in *Conway* v. *Rimmer* (1968) in the light of the contemporary Italian decision in *De Lorenzo* v.

L'Espresso, but there is no discussion of the Roman court's reasoning or motivation.

There is a good deal of repetition in these essays, but they are based on a wide and accurate knowledge of many legal systems, and the points are argued with great clarity and vigour. The book is a fine example of a form of legal literature which is sadly lacking in English, and it is refreshing to read an account of the legal process in its social and political setting written by an author who is himself a lawyer and is aware of the problems with which any legal mechanism must cope.

PETER STEIN.

SCOTLAND YARD. By PETER LAURIE. [London: The Bodley Head. 1970. 295 pp. £2 2s.]

BOOKS about police work, frequently written by ex-policemen, diverting though they may be, often contain little more than chat. This account of the Metropolitan Police far surpasses such amusements. With liveliness and wit Mr. Laurie depicts the administrative structure of the Metropolitan Force and the manner in which policemen of that Force execute their varied tasks, specialised and general. He discusses also, in separate chapters, the problems of dealing with complaints about the police and of assessing the efficiency of the police. The book does contain minor inaccuracies. Leaving aside those mentioned in other reviews, I noticed two. First, the statement on page 85 about a citizen's power of arrest is misleading and any reader acting on it might find himself in trouble. Secondly, on page 87 the statutes which deal with the offence of drunken driving are referred to as the 1968 Road Traffic Act and the 1967 Road Traffic Act. There was no Road Traffic Act passed in 1968 and the relevant 1967 Act is the Road Safety Act. In addition, the statement on page 269 that because the clear-up rate is 24·89 per cent. one "only has to commit a crime four times to be arrested," although admittedly referring to average figures, is more misleading than helpful.

While the book is a most worthwhile addition to the sparse literature of any worth on police work in Britain, it is a little disappointing because it tends to get stuck on description. In saying this I do not intend to denigrate the value of description—the American Bar Foundation Studies on the Criminal Process show how wrong it would be to do that. Certainly this book contains much that anybody might want to know about the Metropolitan Police (although the absence of an index will not facilitate its discovery). My complaint is that Mr. Laurie has wasted a marvellous opportunity to do more than describe. The field work for his book was undertaken in eight months during 1967–68 when he was allowed to accompany policemen on duty, and the description of the police work he saw will no doubt dispel illusions about what policemen actually do and how they do it. But description alone will not give sustained insight into policework. Theory is required for that, and Mr. Laurie in the chapters that deal with operational policemen seems to have done little more than write up his field notes and then present an edited selection from them. The reader is given a series of vignettes of policemen in action. It is true that in the course of the book he does touch on some of the concepts that are dealt with in current theories about police work, for example the existence and exercise of authority within and by the police, status within and outside the police force, the concept of danger and the division of labour in the police force, but these are no sooner touched on than passed over. Had Mr. Laurie grounded himself in current writing (especially American) about the police, after eight months' constant contact with policemen on duty he should have been able to offer comments of a theoretical nature which would have helped the reader to understand why policemen act as they do. Mr. Laurie himself, I think, senses this shortcoming since within three pages of the start of the book he apologises for not attempting to produce a theory of police work on the ground that he was a mere journalist trying to learn in eight months what a policeman takes a lifetime to absorb. "It would be extremely difficult to produce a theory of police discretion: impossible without enormous research to substantiate it," Mr. Laurie writes. The fact, however, that the creation of theories in the social sciences tends to outrun research to substantiate them is not a good reason for refraining from theorising Moreover while I would deny neither of Mr. Laurie's propositions, it is worth pointing out that problems of understanding police work are not all concerned with discretion, if by that is meant the power of the police to choose which laws to enforce and how to enforce them, and that others, for example Skolnick, Wilson and Bittner, and Banton, to a lesser extent, have provided theoretical perspectives with which to view the problems posed by this discretion.

STEPHEN WHITE.

CRIME AND INFORMATION THEORY. By M. A. P. WILLIAMS, Fellow of Nuffield College, Oxford. [Edinburgh: University Press. 1970. 124 pp. £2.]

THE successful prevention and detection of crime depend to a large extent upon the success of the police in the battle of information. The criminal is an "emitter of signals," the policeman an interpreter of signals. Although science is unlikely to replace common sense, intelligence and experience as the principal weapons in the war against crime, nonetheless Dr. Williams shows how valuable a systematised mathematical inquiry into the battle for information can be. The criminal is constantly faced with decisions. Shall he use his own vehicle, a stolen vehicle, or walk; shall he go by day or by night; shall he sell the goods to a local reputable dealer, a distant reputable dealer, or a disreputable dealer. Intelligent anticipation based on systematised information will greatly enhance the chance of police detection.

It may be possible to deter or detect the criminal by manipulating information. False information about the reliability of X fed into the criminal network may reduce the chance of Y and X coming to a criminal bargain because Y will lack confidence in the trustworthiness of X. Exaggerated reports of the amount of the haul in a gang crime may lead to a tip-off by a member who from his share of the loot thereby suspects that he has been double-crossed by his criminal confederates. Means might be found to overcome the reluctance of the victims of blackmail and protection rackets to report the crime.

For those readers who are not aspiring detectives or experimental mathematicians the descriptions of the unit beat policing and the regional crime squads and the commando squads and computer developments will make interesting reading. Anything that increases the effectiveness of prevention and detection deserves the greatest possible encouragement, and Dr. Williams is to be commended on bringing the discipline of mathematics to this critically important subject.

ALEC SAMUELS.